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LAW REFORM—PROCEDURE.

[By T. Walker.]

I announce the authorship of this article at the outset; because it will not express the views of my worthy co-editor, as declared by him in the January number of this journal, page 187. Knowing this fact, and knowing further, that many very eminent members of the profession in Ohio and elsewhere, agree in opinion with my learned associate, I have carefully reviewed the opinions expressed by me in the November number, page 55, in an article on the Report of the New York Commissioners on Practice and Pleadings; and the result is a deliberate re-affirmance of all I then said. Since making that Report, those Commissioners have prepared a "Code of Procedure," framed in accordance with the principles then announced, a specimen of which, on the subject of Pleading, was given in the preceding number, and which will be exhibited more at length hereafter. Suffice it for the present to say, that it proposes to abolish the present forms of Practice and Pleading, and substitute an entirely new system.

Meantime an effort has been made in Ohio to accomplish an equally important result in a much more simple and less hazardous manner. I refer to the introduction of a Bill by Miller Pennington, Esq., a Representative in the Ohio Legislature from the Belmont District, (House Bill No. 76,) entitled "*A Bill to extend and apply the Forms of Proceeding in Chancery to all cases at Common Law.*" As the fact was repeatedly mentioned during the discussion of this bill, as well by friends as by opponents, that I was the author of it, I see

no reason why I should not here plead guilty to the charge, and offer evidence in mitigation. As the bill is not long, it shall first speak for itself.

MR. PENNINGTON'S BILL,

To extend and apply the forms of Proceeding in Chancery to all cases at Common Law.

§ 1. Be it enacted by the General Assembly of the State of Ohio, That, for the redress of any grievance which heretofore might have been redressed by means of either of the several actions of debt, covenant, assumpsit, trespass, trover, detinue, replevin, case, scire facias, or ejectment, instead of the forms of proceeding hitherto pursued in those actions, the forms of Chancery proceeding shall be substituted and pursued, in the manner and with the modifications hereinafter mentioned.

§ 2. That the plaintiff shall commence his proceedings by filing a petition, addressed to the proper Court, setting forth in a plain and succinct manner, the facts of his case, and praying for the issuing of either of the existing writs applicable thereto, as well as for specific and general relief; and such petition shall have the effect, in the first instance, of a precipe.

§ 3. That when the writ so prayed for is a writ of summons, such writ shall be issued, served, and returned in the manner required by the existing law; and this provision shall extend to all cases where the writ of scire facias, or the declaration and notice in ejectment would heretofore have been the first proceeding.

§ 4. That when the writ so prayed for is a writ of capias ad respondendum, or of replevin, or of attachment, or a warrant for the seizure of any watercraft, the petition shall be verified by an affidavit of the same facts as the existing law requires for the issuing of either of the said writs, and such writs shall be respectively issued, served, and returned in the same manner, and the proceedings therein, in regard to bail or other security, shall be the same as provided by the existing law.

§ 5. That if, in any case, service of the writ cannot be made upon any or all of the defendants, the provisions of the existing law, in regard to notice, by publication or otherwise, shall be pursued.

§ 6. That when the defendant shall thus have been brought into Court, the petition shall stand in the place of a declaration; and the defendant shall demur or answer thereto within the time, and according to the rules now provided for demurring or pleading in actions at law; and the consequences of, and proceedings upon any default, shall be the same as now provided for a default in proceedings at law; and in case of the death of either of the parties during the pendency of the suit, the real or personal representatives of the deceased shall be made parties, in the same manner as now provided in Chancery proceedings.

§ 7. That when there is a demurrer to the petition, such demurrer shall specifically set forth the reasons thereof, and the proceedings

thereupon shall be the same as upon a demurrer to a declaration; and the case shall be considered at issue without any joinder in such demurrer.

§ 8. That when there is an answer to the petition, such answer shall only require an affidavit of its truth, when such affidavit would have been required to a plea at law; and then the effect thereof shall be the same. And in all cases the answer shall be taken as admitting all the allegations in the petition which it does not specifically deny; and when it simply denies one or more of the allegations in the petition, without setting up new matter, the case shall be considered at issue without a replication.

§ 9. That when the answer shall set up new matter by way of defence, and the plaintiff shall wish to contest the sufficiency of the same, without denying its truth, he shall put in a demurrer thereto, specifically setting forth the reasons of such demurrer; and the effect of, and proceedings upon such demurrer, shall be the same as in case of a demurrer to a plea at law.

§ 10. That when the plaintiff shall wish to contest the truth of any new matter set up in the answer, he shall put the same in issue, by filing a replication within the same time, and according to the same rules as now provided for a replication at law, and such replication shall be taken as admitting the truth of all such new matter as it does not specifically deny.

§ 11. That when matters of fact have been put in issue, either by the denials contained in the petition or in the replication, or in both, the proceedings in relation to evidence, whether by depositions or by oral testimony, shall be governed by the same rules as prevail in trials at law—except that when the petition or answer relies upon any written document, a copy thereof shall be annexed thereto as an exhibit, or a sufficient reason for not doing so shall be given; otherwise such original document shall not be received in evidence on the trial.

§ 12. That when either party shall desire a trial by jury of the issue so presented, he shall signify the same by a written notice to be filed by him on or before the second day of the trial term, of which the clerk shall make a memorandum on the trial docket; and if there be no such notice, the case shall be taken as submitted to the Court, both as to law and fact.

§ 13. That the jury shall be drawn and summoned, and any deficiency supplied by talismen, and the proceedings on the trial shall be conducted in the same manner as now provided for jury trials in actions at law.

§ 14. That when the object of the suit is damages only, it shall be sufficient for the jury to state, in their verdict, for which party they find, and if for the plaintiff, the amount of damages; but when the object of the suit is to recover some specific thing, whether personaltyor realty, and there is also a claim of damages for detention, or mesne profits, the jury, if they find for the plaintiff, shall also assess the amount of damages, and no other suit shall be prosecuted therefor.

§ 15. That for the finding of a verdict in any case under this act, it shall be sufficient that nine of the twelve jurors concur therein; but the verdict shall in all cases be returned in writing, and be signed by all the jurors concurring therein.

§ 16. That the charge of the Court to the jury shall be strictly confined to matters of law; and shall in all cases be in writing, which shall be delivered to them before they retire to consider of their verdict; and such charge shall afterwards remain on file among the papers in the cause.

§ 17. That all proceedings in regard to bills of particulars, bills of exceptions, motions for a new trial, motions in arrest of judgment, and motions for judgment notwithstanding the verdict, shall be the same as now provided for in actions at law.

§ 18. That judgments, whether upon demurrer, submission or verdict, shall have the same effect, in all respects, as in actions at law, and shall be enforced by the same writs of execution or of possession, or both, as are provided for actions at law; and proceedings after judgment, whether upon appeal, writ of error, or certiorari, shall be the same as are provided by the existing law.

§ 19. That amendments of any proceedings either before or after judgment, shall be allowed upon the same terms as are now provided for amendments in proceedings at law.

§ 20. That, in order to aid in the construction of this act, it is declared to be its true intent and meaning to change the forms of proceeding only, and not the legal rights of parties, any further than is herein expressly provided.

§ 21. That all laws and parts thereof, inconsistent with this act, are hereby repealed.

§ 22. That this act shall take effect and be in force from and after the fourth day of July next; but all actions then pending shall be prosecuted as if this act had not been passed.

I trust I shall violate no rule of propriety, and give no offence to my friend, if I publish a portion of his letter addressed to me, which led to the preparation of this bill.

House of Representatives, Dec. 6, 1847.

HON. T. WALKER, CINCINNATI.

DEAR SIR—Being a member of the Legislature, I shall feel free to ask counsel of my friend and preceptor. While a member of your Law School, my mind became imbued with the principles of legal Reform; and now that an opportunity is afforded to act, I shall most cordially embrace it. I desire to consolidate the forms of actions so that we will have but one action of contract, one for consequential damages, one to recover the thing, and the action of ejectment simplified so as to conform to *common sense* and *reason.*

You will do me, Sir, a great favor by drawing up a bill to meet something like the above, or rather, send me a bill to meet your own views of the matter. The time is now, and was long ago, when a move in this matter should have been made by the Bar, anp thereby have relieved our honorable profession of much of the public odium that attaches to it. I hope you will consider this matter worthy of your consideration, and at your earliest convenience send me a bill, together with your views as fully as you can. Respectfully yours,

M. PENNINGTON.

To this I replied, that I should be at Columbus in a few days, and would consult with him. We did confer together, and the result was the preparation of the foregoing bill, which I enclosed to him in a letter, of which the following is a copy.

Columbus, Dec. 15, 1847.

M. Pennington, Esq., Member of Assembly.

My Dear Sir—According to your request and my promise, I herewith hand you the draft of a "Bill to extend and apply the forms of proceeding in chancery to all cases at common law." If you can procure its passage, I think you will confer a great and lasting benefit upon the State. The law must be redeemed from the well deserved charge of excessive technicality. This feeling in New York is likely to go too far, by destroying all the landmarks of practice, in the attempt to create an entirely new system. This bill only seeks to adapt a well known and well defined system already in use, and the best, perhaps, the world ever saw, having been used and improved for more than twenty centuries, to all matters of litigation. I have, however, beyond this, proposed two innovations, which are entirely independent of the general object of the bill, and may be kept out without affecting it. The first is, to make the jurors sign their verdict, and let three-fourths be sufficient for finding it. We let a majority prevail in the great matters of government, and the lesser ones of arbitration, and why not in verdicts? But instead of a bare majority, I have fixed three-fourths. The second is, to require the charge of the Judge to be in writing, delivered to the jury, and kept on file. This has been tried in Missouri with great success. It keeps the Judge to the point, makes certain what he does say, and holds him to strict accountability therefor. In fine, I think the bill, though hastily drawn, in part of a day, and with no books before me, a good one. Doubtless there are omissions which time will detect and supply. When printed, please send me a copy.

Do not be too sanguine of success this year. You will encounter a host of prejudices, and all among our profession. But the intelligent people will be with you, and you must ultimately prevail. If not, it is one of those attempts in which it is noble even to fail. Very truly your friend,

T. WALKER.

I have been favored with a copy of the speech of Mr. Pennington, delivered on the 5th February, 1848, from which, not having room for the whole, I make the following extracts.

In our day, when civilization and learning have shed their benign influence into every nook of society, when the old theories and prejudices of other times, in relation to other branches of science, have been discarded, we have a right to expect that when an attempt is made to prune the science of law of the relics of feudal times, and to substitute truth for falsehood, reality for fiction, and common sense for jargon, that no objection will be made. But as that distinguished Judge, Sir Matthew Hale, has well observed, "by long use and custom, men, especially that are aged, and have been long educated to the profession and practice of law, contract a kind of superstitious veneration for it beyond what is just and reasonable. They tenaciously and vigorously maintain these very forms and proceedings, and practices, which, though possibly at first they were reasonable and useful, yet by the very change of matters, they become not only useless and imperfect, but burdensome and inconvenient, and prejudicial to the common justice and common good of mankind; not considering that the forms and prescripts of law were introduced, not for their own sakes, but for the use of public jus-

tice; and therefore, when they become insipid, useless, impertinent, and possibly derogatory to the end, they may and must be removed." These are words of wisdom, and every lawyer should be impressed with their truth.

I have carefully considered of this bill, and am prepared to defend it at all hazards. I am unwilling, as an humble member of that learned and venerable profession, to see it year after year sink deeper and deeper into public odium, on account of its excessive technicality. Why is it that the law is unpopular? Why is it that there is arrayed against it such a prejudice? Is it because the people are not honest? because they are not intelligent? Let no man dare say that: they are honest; they are intelligent. The reason is, the lawyers have been at fault, in permitting so much technicality to clog up the pathway of justice. I do not mean that the principles of law are justly subjected to this charge, but I mean the ways and modes of applying these principles, that are now used; the forms of the remedy, in other words, are justly the subject of censure and of the indignation of the people. * * *

The time, if not now, is not far distant, when the question of calling a Convention to amend the Constitution, will be submitted to the people. When that Convention shall meet and revise the present judiciary system, does any man pretend to believe but that the present forms of proceeding, if not the law itself, will not be radically changed? It will be here then, as in New York now: the best men of the State will tremble for the consequences of trying an untried experiment. That many, very many existing evils would be cured, I have no rational doubt; but to devise an entire new system, without the certainty of success, might prove disastrous, and defeat the ends aimed at. It is not proposed to try any new experiment, to go whither we know not where, but to follow the beacon light of experience—to adopt in Courts of law, a form of proceeding, that has been demonstrated to be wise and practicable. The object of this bill is to extend and apply the forms of proceeding in Chancery to all cases at Common Law. I desire to discuss its merits and shall earnestly demand its passage, for the sake of the untrammeled administration of justice, and the credit and honor of the profession.

A claims to have a good cause of action against B. B claims, on the other hand, that he has done A no injury; that he has no ground of complaint. Now, I would ask, what would be the direct and common sense way of ascertaining the exact merits of the case?—because, if there is a plain way of getting at the matter, we should not be compelled to resort to any other. Would it not be to require of A to write down in a plain and brief manner, the exact cause of his complaint, the time and manner the debt accrued, or the injury occurred, and to have B set out his defence in the same manner; and thus let the case go to the Court and jury, that it may be determined for which party the verdict and judgment should be rendered? This is briefly the mode of proceeding which this bill contemplates—the system now pursued in Courts of Chancery. This

Court of Chancery was established to give redress for wrongs where redress could not be obtained in Courts of Law. The question arises, why could not Courts of Law administer this relief, afford this remedy? The undeniable answer is, that the forms of proceeding at law were so exceedingly technical, that the Court, in many cases, were unable to afford that relief which justice required, and hence the necessity of another tribunal. What was the object in adopting these *forms* of proceeding? Was it not to facilitate the administration of justice between man and man? The establishment of Courts of Chancery is, then, an admission that these forms have not answered all the purposes of their creation. Courts of Law and Courts of Chancery aim to accomplish the same great object, the administration of justice; and it might require some ingenuity to satisfy an inquiring mind of the absolute necessity of the two systems. But it is not proposed to blend them together, only so far as the form of proceeding is concerned. If there is as much virtue in these forms of action—if they constitute such an admirable system of logic, as some lawyers will have it, why are they not observed and pursued in your Chancery practice? Why is it that in Chancery, you commence your suit by petition, setting forth your case in the simplest and plainest form? The reason has been already given: it is a Court to give redress for grievances, that are remediless in Courts of law. So that it amounts to this—that the legal fictions, which belong to the practice of law, prevent the full administration of public justice, and hence you are compelled to resort to a Court where fiction is unknown—to a Court where you are required to set forth your case after the manner this bill points out. Why not then extend this form of proceeding to Courts of law? No substantial reason can be given against it. Judges have not hesitated to become legislators, and set aside *principles* of law, when the public good seemed to require it, and sometimes when it did not; and shall the Legislature hesitate to get rid of distinctions and forms, which have become worse than useless—have become stumbling blocks in the road to justice?

The first section of this bill provides, that for the redress of any grievance, which heretofore might have been redressed by means of the several actions of debt, covenant, assumpsit, trespass, trover, detinue, replevin, case, scire facias, or ejectment, instead of the forms of proceeding hitherto pursued in those actions, the forms of Chancery proceeding shall be substituted; and that the plaintiff shall commence his case by filing a petition, addressed to the proper Court, setting forth in a plain and succinct manner, the facts of his case, &c. This is the proposed change. It is not to make a new system, but to redeem the law from the justly merited charge of excessive technicality, and adapt to all matters of litigation, a well known and well defined system already in use, and the best perhaps the world will ever know, having been used and improved upon for centuries. But the objection is, it is a revolution; it is too sudden a change; the profession have become so accustomed to these old forms and fic-

tions, that we ought therefore to continue them. I suppose, therefore the poor slave ought to forever wear the galling chains of slavery, because he is used to the oppression—ready almost to exclaim with the Prisoner of Chillon—

> "My very chains and I grew friends,
> So much a long communion tends
> To make us what we are: even I
> Regained my freedom with a sigh."

* * * * * *

In numerous recorded cases, after much time has been spent, and a large amount of costs incurred, and hard labor on the part of the attorney to get the case to the Court and jury, he is told it is not in the right *shape* to be heard; that, from the *present state of the pleadings*, the true merits of the case cannot be inquired into; that the plaintiff must be nonsuited, because he ought to have brought trespass instead of case, or on account of some other misconception of the action; or the defendant, on the other hand, adjudged to pay the costs, because he was not quite technical enough in setting out his defence. I speak what every lawyer knows to be true, and what thousands of ruined clients have reaped the bitter fruits of. I could take up law book after law book, Report after Report, and abundantly sustain the truth of this assertion—show how many cases have gone off on mere matters of form—time exhausted, money spent, and justice outraged, from a blind veneration and adherence to the "Goddess Form." It has indeed become a stupendous evil—an evil that is seen and *felt* in almost every litigated case. * *

Why is it that a man shall not be allowed to come into your Courts, and set forth his complaint as this bill points out, in a plain and brief manner, without technicality? Why is it that you require of him to decide which one of the nine different forms of action he will bring, and that he shall observe, from the commencement of his suit to the end of it, formalities at which every honest man ought to blush? I say, sir, why is all this? It is because the prejudices of the profession are adverse to change—because at one day in the world the lawyers were paid according to the length of the declaration. And although such is not now the fact, yet their veneration for these old customs of half civilized Europe, travelling down to us through the ever-rolling current of ages, with but little modification, shuts their eyes to the doctrine of legal reform—makes them loud in denunciation of any attempt at innovation. I am one of those who think we are making progress in the principles of civilization; that it was time long ago to have abolished these fictions, and substituted a simpler form of administering justice. * * *

I shall not consume the time of the House in showing the absurd distinctions which exist in all the different forms of action. But take for an example that of ejectment, an action to try title to real estate—a sort of mixed action. If any lawyer in the State is not ashamed of the nothing else than technicality that surrounds this action, he must have impudence beyond endurance. To have those

noted characters, John Doe and Richard Roe, and the falsehoods necessary to be told to get the real parties properly into Court, associated with, and made an indispensable part of this proceeding, is nothing short of a disgrace to law and lawyers.

Take for another example, the action of trover. As defined by Lord Mansfield, in *form* it is a fiction, in *substance* it is a remedy to recover the value of personal property wrongfully converted by another to his own use. The fiction that is indispensable to observe in your declaration is, that the Plaintiff upon a certain time lost the property, and that the same afterwards came into the possession of the Defendant by finding. This is an averment which every Lawyer knows, when he writes it, is at variance with the facts of the case, and false; and yet if he would omit this fiction, he would be subject to have his declaration set aside, and the penalty would be the costs of suit upon his client. Sir, we have been uttering and publishing these *legal lies* long enough.—In the name of Justice and truth I repudiate them, as an insult to common sense, and the great science of law. Let the *form* and the *substance* of the case agree.

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It is not proposed to change principles of law, but to establish a form of proceeding that will fully develop this great science—shed its benign influence abroad in the land—instil its wisdom into the hearts of the people, and impress it on their minds, that "its seat is the bosom of God, and its voice the harmony of the world." It is idle to talk about elevating this science in the minds of the people, as long as this senseless verbiage is suffered to encumber it. They never will, and they never ought to appreciate and respect such jargon. The avowed and practical object of this bill is to get rid of it.

There are, however, two sections in this bill, which may be deemed an innovation of principle: Section 15 makes it sufficient to find a verdict, that nine jurymen shall concur therein. I know full well that the right of trial by jury is sacred, that it is the boast of freemen, and this bill does not propose to abolish it. Majorities govern in the affairs of nations, and control our dearest interests and most sacred rights. Why should not this principle obtain in the finding of a verdict? But this goes further, requiring three fourths. Can any evil result? We have seen, time and again, the power of one man on the Jury making the verdict at his pleasure, or preventing an agreement, and thus putting the parties to the cost of another trial. I believe it would prove beneficial, and no injury could result in trying the experiment.

Section 16 requires, "that the charge of the Court to the Jury shall in all cases be in writing, which shall be delivered to them before they retire to consider of their verdict, and such charge shall afterwards remain on file among the papers of the cause." I think I might appeal to the experience of every Lawyer, if this is not an essential provision. How often have you been disgusted in listening to the charge of the Court in intimating, and often in direct terms,

their opinion to the Jury as to what their verdict should be? And that opinion, we all know, has great weight, and has, to my *certain knowledge*, defeated, in some cases, the ends of Justice. To prevent this evil this section was engrafted in the bill. It has been tried in Missouri, and with great success. There is always sufficient time, during the progress of a trial, for the Judge to write out his opinion. It keeps him to the point; makes certain what he does say; prevents him from intimating his opinion to the jury as to the facts of the case; and holds him to a strict accountability for all he does say. And the jury, when they retire to deliberate upon their verdict, will have before them the charge of the Court in writing, so that no difficuly can arise as to what the charge was.

I have thus endeavored to present, as briefly as I could, the merits of the main provisions of this bill. Shall it receive the sanction of this House, and become the law of this State? The question is now fairly put—shall we continue these fictions and technicalities, or shall we get rid of them? For one, I am for abolishing these distinctions. They are incompatible with the spirit of our free institutions—incompatible with the full and fair administration of justice, and are a reproach to the profession. Let us not be bigots, and tenaciously adhere to formalities at the expense of truth, but honestly and vigorously engage in emancipating ourselves from the tyranny of custom. * * *

Let us look at this great question with a spirit of liberality, with the great fact impressed upon our minds, that the object of the law is JUSTICE; that the simpler and shorter the form, the more certainly will its purposes be answered. If we do not act now, the time is fast approaching when the irresistible power of public opinion will compel us to act. We cannot mistake the signs of the times; we cannot check the onward march of public sentiment. This doctrine of legal reform is gaining ground; it is taking deep hold in the honest hearts of the people. The fire has been kindled in New York. Its light will illuminate the public mind of other States, until the whole land shall be awakened to a sense of duty to eradicate these evils, to wipe out these relics of barbarian Europe—these prejudices of the profession—these legal fictions and disgusting absurdities,—and build up a system of administering justice between man and man, congenial to the enlightened wisdom of the age.

I prefer now, when no storm is raging, when the public mind is quiet, when radical demagogues are not in power, when reason, not passion, governs, to carry out this doctrine of reform. For the honor of the profession; for the sake of the pure administration of justice; for the sake of the dearest rights and interests of the people of this great State—I invoke the passage of this bill.

I have not been favored with copies of any other speech, for or against this bill; and if I had, should not now have room for them. Its history may be briefly stated as follows. It was engrossed in the House by the following vote:

YEAS—Messrs. Armstrong, Blake, Brainard, Brewer, Clark, Cock, Converse, Corwine, Culbertson, Dodds, Elliott, Farrington, Hardesty, Harrington, Holcomb, Johnston, Kimball, Landis, Lawrence, Lidey, Matthews, Morrow, Musgrave, McKenney, McWright, Nigh, Patton, Pennington, Randall, Robinson, Russell, Seward, Shaw, Smith *of Brown*, Smith *of Hamilton*, Westen, Williams *of Coshocton*, Williams *of Columbiana*—38.

NAYS—Messrs. Anthony, Atherton, Bain, Brackley, Breck, Coe, Conklin, Coolman, Cotton, Crothers, Drake, Haynes, Huston, Kennedy, Lyle, Noble, Norris, Park, Perry, Phillips, Potter, Taylor, Totten, Trimble, Voris *of Summit*, Wilson, and Speaker—27.

It was afterwards indefinitely postponed by the following vote:

YEAS—Messrs. Anthony, Atherton, Bain, Brackley, Breck, Coe, Conklin, Coolman, Cotton, Crothers, Dodds, Drake, Farrington, Fristo, Harrington, Haynes, Huston, Kimball, Noble, Norris, Park, Perry, Phillips, Potter, Seward, Taylor, Trimble, Truesdale, Voris *of Summit*, Westen, Wilson, and Speaker—32.

NAYS—Armstrong, Blake, Brainard, Clark, Cock, Converse, Corwine, Culbertson, Hardesty, Holcomb, Johnston, Kennedy, Landis, Lawrence, Lyle, Matthews, Morrow, Musgrave, McKenney, Nigh, Patton, Pennington, Robinson, Russell, Shaw, Smith *of Brown*, Smith *of Hamilton*, Totten, Warren, Williams *of Coshocton*, Williams *of Columbiana*—31.

This last vote was reconsidered without objection; and at the instance of Mr. Pennington, the further consideration of the bill was postponed to the next session, because, as he informs me, he was satisfied that it could not pass the Senate at this session, then approaching the close.

I have been thus particular in detailing the history of this bill, because I believe that its passage, or the passage of something like it, would be a blessing to the people of Ohio; and because the vote upon its engrossment, including the names of many of the best lawyers in the House in its favor, affords an indication as unmistakeable as it is cheering, that the friends of reform need not despair.

Nevertheless, as I may be wholly at fault about the merits of this particular reform, as one of the editors of this journal, I earnestly invite candid discussion. The subject must and will be agitated. Let it be done in a frank and manly spirit.

DISTRIBUTION OF THE POWERS OF GOVERNMENT IN THE AMERICAN CONSTITUTIONS.

[By Archibald Williams.]

The division of the powers of government into legislative, judicial, and executive, and their distribution among distinct and co-ordinate departments, is of purely American origin. The establishment of an independent judiciary, as a co-ordinate department of government, clothed with power to declare the acts of the Legislature void, seems never to have been attempted elsewhere. In other countries, the legislative has always been considered the supreme power of the State, and no effort has ever been made to limit its authority. Even in England, where a nearer approximation to constitutional liberty has been made than in any other country of the old world, Parliament—the legislative power—is supreme. The established doctrine is, that "its power and jurisdiction are so transcendent and absolute, that it cannot be confined either for causes or persons; that it hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviewing, and expounding of laws of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal—this being the place where that absolute despotic power, which, it is said, must, in all governments, reside somewhere, is entrusted by the Constitution of these Kingdoms." This is the approved doctrine every where out of the North American States. Here that absolute and despotic power resides in the people, and not in the governments. With us the power of the government is accurately defined and limited by written constitutions; and, to secure the observance of these limitations, it is divided and assigned in distinct portions to independent and separate departments, each alike supreme within its prescribed limits. This is the great cardinal principle of the American Constitutions, which distinguishes them from all other forms of government, and to which they are chiefly indebted for their superiority.

The excellence of this distributive principle has been the subject of frequent and enthusiastic eulogy with American jurists and statesmen. It has been well described as creating a system of checks and balances, whereby the government is made to control itself at the

same time that it governs the citizen. Speaking of this principle, Mr. Madison says: "In framing a government which is to be administered by men, over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself." *Federalist, No.* 51, *page* 291. Judge Hickey calls it an important conservative principle. It is again described in the *Federalist* as the best, and indeed the only method, of preventing the accumulation of all powers, whether legislative, judiciary, or executive, in the same hands; which accumulation is justly pronounced the very definition of tyranny. *Fed.* 270. Alexander Hamilton considered it an indispensable characteristic of free government. Justice Story says it is a favorite policy with statesmen and patriots, and that it was by many deemed a maxim of vital importance. Chancellor Kent says it is essential to peace and safety in every government. Judge Nichols says that it is of the last importance to the purity of our institutions, and should be kept up as a barrier against encroachment. Judge Underwood characterizes it as a mutual check, necessary to the safety of the people. Judge Waters, of South Carolina, says it is the characteristic of a free government, and essential to civil liberty. Mr. Calhoun regards it as the true and only method of preserving any balance of power in a mixed government. Mr. Webster agrees with Mr. Calhoun, and says, "to that end, encroachment must be resisted at the first steps." He regards it as the principle on which governments are constructed, and remarks, that "it is as important to guard against the encroachments of one branch of the government upon the rights of the others, as it is to guard against the encroachments of all the branches upon the rights of the people, since, in either case, the balanced and well adjusted machinery of free government would be disturbed and finally destroyed." The same sentiment has been asserted and repeated in every variety of form by all the great statesmen and jurists of this country, until it has become the almost universal American opinion.

This principle, as imperfectly applied in Great Britain, has been much admired by the most enlightened jurists of Europe. They all agree that when the two powers of making and enforcing the laws are united in the same hands, there can be no public liberty; that the magistrate being possessed, in quality of dispenser of justice, with all the power which he, as the legislator, thinks proper to give himself, may enact tyrannical laws, and execute them in a tyrannical manner.

The foregoing sketches fully illustrate the importance, object, and design of this great principle; and whilst its object and design furnish to statesmen an unerring rule for their guidance in organizing the different departments of government, and in the division and distribution of power and jurisdiction among them, and to Judges the true canon of interpretation, its vast importance indicates the absolute necessity of resisting any and all infractions of it.

To this end, the departments should not only be separate and distinct, but they should be independent of each other, and the power should be so distributed and adjusted between them, that neither could originate and execute any measure of oppression without the co-operation of the others. It is in this way, and this way only, that each department can effectually prevent encroachments by the others. Hence, by the American Constitutions, the Legislature can only pass general laws for the government of society; the judiciary can only expound and apply these laws to the cases of individuals in society; and the executive can only enforce obedience to the mandates of such laws, when thus made, expounded and applied. Thus the Legislature alone can *originate* measures of oppression, the judiciary alone can *apply* them to the intended victim, and the executive alone can *consummate* them, so that a refusal of either to concur in the oppression would effectually defeat it.

This beautiful and well adjusted system is worthy of all the praises which have been bestowed upon it, and should be assiduously cherished and improved by the people for whose protection it is intended. The Judges should, at all hazards, resist every attempt to disturb or destroy it; for to them, in a peculiar manner, is intrusted the duty of preserving it in all its health and vigor.

It is to be regretted that, though so much has been said in commendation of this principle, the *nature* and *extent* of the limits imposed by it upon the power of the different departments of government, and more particularly upon that of the legislative, have been but little discussed, and by many very imperfectly understood. Two Judges—Hopkinson and Young—one of whom at least, is a man of learning, intelligence and talent—have had the boldness, if not the temerity, to affirm, that it "is only a declaration of the general system or theory of our government, and was never intended to fix exact and impassable limits to each department." 7 *Peters Rep.* 668; 2 *Gilman Rep.* 510.

If this be true, then this principle is entirely worthless. It is mere mockery. It is intended for the admiration of the visionary philoso-

pher, but not for the wants and condition of practical men. It is beautiful to contemplate and talk about, but it has no practical results. But such is not the government for which our fathers struggled. They were practical business men, and in forming a government, they adapted it to the nature of man as he is found in the bustle of active life, and not merely to the admiring contemplation of the closeted philosopher. They did not intend, when they guarded against tyranny theoretically, by permitting the accumulation of all power in the same hands, that, practically, this result should exist in all its odiousness. They did not design, when they declared, in theory, that the judicial and executive power should be vested in the judicial and executive departments, that, practically, the Legislature might exercise these forms, and thus establish tyranny by drawing all the powers of government into the same hands. They did not, in short, at the same time that they imposed limitations, render those limitations altogether useless by granting the power of dispensation.

If the Legislature may exercise any portion of judicial power, it may exercise the whole, and the same is true of the executive power. If the inhibition is imperative as to part, it is as to all.

This construction of Judge Hopkinson and Judge Young, is prohibited as well by authority and the plain import of the words, as by the spirit and object of this principle. It has been decided by many cases, that this principle does impose real and substantial limits upon the different departments of the government. Among many others it may be sufficient to refer to the following: *Lane et al.* v. *Dorman et al.*, 3 *Scam.* 238; *Hayburn's case*, 1 *Kent Com.* 450; 2 *Dall.* 410, 411, 412; *Davis* v. *Ballard*, 1 *J. J. Marsh.* 567; *Gaines* v. *Buford*, 1 *Dana* 486; 1 *Kent Com.* 290–1–5; 3 *Story Const.* §§ 1586–87; *Zylstra* v. *The Corporation of Charleston*, 1 *Bay* 396; *Ex parte Bedford*, *Amer. Jurist and Law Magazine*, *No.* 20, *page* 309; *Ex parte Robert B. Randolph*, 2 *Brockenb. Rep.* 479.

In the last case, Chief Justice Marshall, the great oracle of Constitutional law, says: "If this ascertainment of the sum due to the government, and this issuing of process to levy the sum so ascertained to be due, be the exercise of any portion of the judicial power of the United States, the law which directs it is plainly a violation of the first section of the third article of the Constitution; which declares that the judicial power shall be vested in one Supreme Court, and such inferior Courts as Congress shall from time to time ordain and establish. The Judges both of the superior and inferior Courts shall hold their offices during good behaviour. The judicial

power extends to controversies to which the United States shall be a party. The persons who are directed by the act of Congress to ascertain the debt due from a delinquent receiver of public money, and to issue process to compel the payment of that debt, do not compose a Court ordained and established by Congress. Nor do they hold offices during good behaviour. Their offices are held at the pleasure of the President of the United States. They are consequently incapable of exercising any portion of the judicial power, and the act which attempts to confer it is absolutely void."

This decides that the Legislature can only confer judicial power upon the established Courts, and that all attempts to confer it upon others are absolutely void. The other cases referred to above are equally conclusive upon the point that the Legislature cannot itself exercise judicial power.

It may then be regarded as settled upon authority and reason, that this distributive principle was intended to impose, and does impose, practical limits upon the power of the different departments; that it effectually restrains the Legislature from exercising judicial power itself, and from authorizing the exercise of such power by any others not composing an established Court. If this principle does not impose *practical* restraints; if, as asserted by the two Judges above mentioned, it is only declaratory of the theory of our government; and if, in spite of it, the different govermental powers blend indistinguishably together, then the attempt to separate them was utterly vain and foolish, and the best feature of our Constitutions is practically blotted out. But I apprehend it will be found, upon a careful survey of the subject, that these powers are separated from each other by well defined lines of distinction.

Regarding this as a question of great importance, and absolutely necessary to be clearly understood by every Judge and lawyer, I may, at some future time, attempt to point out a criterion, founded on the nature and object of judicial power as explained by eminent Judges, by which it may be known and distinguished from the other powers of government.

DISTRICT COURT OF IOWA—BEFORE JUDGE OLNEY: FALL TERM, 1847.

[We have great pleasure in publishing the following Decisions of Judge Cyrus Olney, for several reasons. First, they are regarded as of great practical importance in that new State. Secondly, they are fine specimens of clearness and brevity. Lastly, Judge Olney is a recent graduate of the Law Department of the Cincinnati College; and the many warm friends he there made, will rejoice in this evidence of his rapid professional success.]

The State v. *Curry*. This was a proceeding by *scire facias* upon a recognizance of bail, in a criminal case, to recover the penalty forfeited by the non-appearance of the prisoner. The surety pleaded that, after the default, he tendered to the county Treasurer the amount of the penalty in county orders. The cause coming before the Court on a demurrer to that plea, two questions were presented: First, whether the money would go to the support of schools, and, if so, then second, whether it could be paid in county orders.

By the Court. Although moneys forfeited upon recognizances taken in the course of criminal proceedings, or for the preservation of the peace, or otherwise to secure obedience to the penal laws, are obtained through contract, in point of *form*; yet, being demanded by the government, without consideration, as a means of enforcing the laws, they are substantially "fines for breaches of the penal laws," and therefore appropriated by the constitution to the support of schools. The provision which that instrument makes for educating the people consists of two parts, one of which is to be executed by the government, whilst the other executes itself. The General Assembly is to establish a system of common schools, and provide the necessary machinery to carry the system into effect and keep it in operation. This is directory merely, and, if disregarded, there exists no means of compelling the legislature to perform its duty. But a school system, when established, is one of constant expenditure. Who is to supply the money? It is not required of the government. If it were, it might, with impunity, be disregarded. This part of the business—the supplying of the money—is executed by the constitution. It declares that all moneys derived from certain sources shall be appropriated to this use. It designates the moneys, and, as fast as they come into existence, or can be identified *in future*, it lays its hand upon them and passes them over to the school fund, thereby giving them a character which effectually prevents them from mixing with the moneys of the State. Of this

fund the state is a trustee and not the owner. In the hands of state and county officers the constitution follows it and preserves its trust character; and the courts will no more permit the government, through these officers, to apply it to any other use than that specified in the constitution, than they would suffer a private individual to misapply moneys which he holds in trust. The State may neglect its duties in respect to the fund—may suffer it to go to waste, by omitting to provide for its collection and preservation, or may suffer it to accumulate, by omitting to provide schools upon which it can be expended,—but it cannot apply a dollar to any other use. It follows that the statute authorizing payment of fines in county orders, is repealed by the constitution. School moneys must be collected in cash, and kept in cash, and disbursed in cash. They cannot be applied to the payment of state or county debts, or to the redemption of state or county orders. The school fund cannot be compelled to receive claims against the county, the state, or any body else, in lieu of money. *Judgment for Plaintiff.*

Commissioners of Mahaska, v. *Lee.* This was a suit on a promissory note, to which the defendant pleaded a set off. The cause being submitted to the Court, it appeared by the evidence that the note was given for a town lot in Oskaloosa, the county seat; that the money was needed for the completion of the public buildings; that the town was laid out by the plaintiffs on land which they purchased by pre-emption under the act of Congress; that the set off consisted of county orders, drawn, not upon the town lot fund, for expenses incurred in the erection of public buildings, but upon the treasury generally, for ordinary county expenses; and that the plaintiffs had, in some instances, applied the proceeds of town lots to the redemption of similar orders. The plaintiffs insisted, that as the act of Congress required the proceeds of the lots to be expended in the construction of public buildings, they could not, so long as they were needed for that purpose, be compelled to apply them to the redemption of the county orders held by the defendant. The defendant insisted that the United States alone could complain of a misapplication of the money, and that, the conduct of the plaintiffs precluded them from claiming it as partaking of the nature of a trust fund.

By the Court. This money is appropriated to a specific object. It is not necessary, in this case, to enquire whether it amounts to a trust, or who has a right to look after its application. If the plaintiffs are disposed to do their duty, their past delinqencies shall not

preclude them; and whatever may be their *power* to divert the money from its appropriate use, they certainly cannot be *compelled* to do so until the objeet to which it is appropriated has been fully accomplished. They cannot be compelled to apply the money to the payment of these county orders. *Judgment for plaintiffs.*

Baer v. *Commissioners of Mahaska.* This was an appeal from the decision of the Board. The plaintiff, who was county treasurer, in receiving county orders in payment of taxes, allowed interest on them to the holders. On settling with the Board they disallowed this interest, and the plaintiff appealed.

By the Court. In no case, and under no circumstances, is interest given by the common law. Neither are the parties prevented by the common law from contracting for any rate of interest they can agree upon. Interest is given by statute, and limited by statute. The statute of this State giving interest where interest is not agreed for, does not apply to county orders and State Auditor's warrants. There is a statute authorizing the payment of interest on State warrants from the time they are presented until redeemed; and there was once a like provision in respect to county orders, which is now repealed. *Decision of the Board affirmed.*

John W. Ross v. *Commissioners of Wapello.* This was an agreed case submitted to the Court. The plaintiff, the Clerk of the District Court, claimed $76.59 for fees in certain criminal cases which resulted in acquittal.

By the Court. The act of 1839 concerning costs and fees, required payment of these costs by the prosecutor, the county, or the territory, as the Judge should direct. The act regulating criminal proceedings, previously passed, but which did not take effect until January 1, 1840, directed payment by the county. On the 15th February, 1842, these acts were amended—the former, by substituting, in the place of fees, an annual allowance to clerks and sheriffs not exceeding thirty dollars, and the latter, by prohibiting the Court from rendering costs against the county or territory. At the session of 1842–3, the former act as amended was re-enacted, and the latter with its amendment was ordered to be reprinted and remain in force. On the 1st of January, 1846, the latter act was further amended by allowing the fees of witnesses out of the county treasury. The two amendatory acts of 15th February, ary, 1842, as reprinted and re-enacted, furnish the law of this case.

By them the Court is prohibited from awarding payment of these fees out of the county treasury, and the commissioners are required to make the clerk an annual allowance instead. A similar construction was given to these statutes by two District Judges at the last August term in Jefferson. The law, if we interpret it correctly, requires the county to pay costs of criminal proceedings, only, first, to sheriffs and clerks, the aforesaid annual allowance; second, to sheriffs, their actual traveling expenses in pursuing criminals out of their counties; and third, to witnesses, their usual fees on the trial of indictments in the District Court which result in acquittal. That no other payments out of the public treasury are authorized by law, is still the opinion of this Court. *Let a nonsuit be entered.*

HURON COMMON PLEAS: MARCH TERM. 1848.

WM. SUTTON *v.* MCILHANY AND OTHERS.

RIGHT OF SUFFRAGE—CONVICTION OF PENITENTIARY OFFENCE—PARDON AFTER EXPIRATION OF SENTENCE.

THIS was an action on the case, brought by plaintiff against the defendants, trustees of Lyme township, because they refused to receive the plaintiff's vote. The questions submitted to the Court were raised by demurrer to the replication of the plaintiff to one of defendants' pleas. The declaration alleges that on the 13th of October, 1836, a general election was held in said township; that defendants were trustees of the election; that the plaintiff was then and there a duly qualified voter, and tendered his vote, and which said defendants then and there *wilfully*, *wickedly*, and *corruptly* rejected, &c.

The defendants pleaded, first, the general issue; secondly, that the plaintiff, at, &c., was indicted and convicted for keeping instruments for counterfeiting, was sentenced to the Penitentiary for the term of three years, and before the grievance complained of, had served out his term therein.

To the second plea the plaintiff replied, that in September, 1844, after the expiration of the term of sentence, and before the grievances complained of, Thos. W. Bartley, the then acting Governor, by virtue of the authority vested in him, &c., granted to the plaintiff a general pardon from said sentence, &c.

The defendants demurred to this replication.

Ezra M. Stom for the plaintiff, and Samuel T. Worcester for defendants.

Per Curiam—Sadler, P. J. The principal question intended to be raised by the pleadings in this case is, whether the Governor, after the expiration of he sentence, can by his pardon restore the culprit to his civil rights. There are other questions raised in the case, and we will dispose of them *seriatim.*

The first objection to the replication is, that it does not allege the pardon to be under seal.

Art. 2d, § 5th, of the State Constitution, provides, that "after conviction, the Governor shall have power to grant reprieves and pardons, except in cases of impeachment." And the Statute, (Swan's) page 239, declares that the pardon "shall be under the hand of the Governor and the seal of the State."

The Legislature have the undoubted right to prescribe the mode of granting pardons, whether they shall be by parol, in writing, or under seal, and how they shall be authenticated. It has required them to be "under the hand of the Governor and the seal of the State." A pretended pardon, issued without the seal, would be a nullity. It would be a private, and not an official act of the Governor. When the law requires an instrument to be sealed, and it becomes necessary in the course of pleading to set it up, by either party, the party pleading it must aver it has a seal. 1 *Chitty Pl.* 348–349; 12 *John. Rep.* 197; 1 *Saund.* 291, *n.* 1.

The demurrer therefore in this respect is well taken, and the plaintiff has leave to amend on the usual terms.

It is next urged that the official character of the Executive is improperly described. He is described as "Thos. W. Bartley, the then acting Governor of the State." It is said there is no such officer as the "acting Governor;" that he was Speaker of the Senate, and as such discharged the duties of Governor, the office of Governor being vacant. In case of the death or removal of the Governor, the Constitution provides that the "Speaker of the Senate shall exercise the office of Governor." *Art. 2d*, § 12. *De facto* then, the Speaker is Governor, the acting *ex officio* Governor. If he had been described as Speaker of the Senate, discharging the duties of Governor, it might perhaps have been more technically correct; but it would have conveyed the same idea, and meant precisely the same thing. The official character of the Executive we think is well described.

Can the Executive, after the expiration of the sentence of imprisonment, grant a pardon to restore the culprit to his civil rights? By the Statute (*Swan* 238–9) it is provided that persons convicted of Penitentiary offences, &c., "shall be deemed to be incompetent to be an elector, juror, or witness, or to hold any office of profit or honor within the State, unless the convict shall receive from the Governor a general pardon," &c.

It is claimed by the defendants that these disabilities, as they are no part of the sentence of the Court, are not of themselves the subjects of pardon, but are incident to the sentence. That it is from the *sentence* of the Court only, that the Executive can grant a release; and when the sentence has been endured, there is nothing left upon which the Governor's pardon can operate. That when a convict is pardoned and released from the execution of the *sentence*, as incident to the sentence, his disabilities are removed, but that they cannot be reached by the Governor's pardon, except through the sentence itself.

Are these disabilities a mere incident to the sentence, or are they a part of the punishment for the offence? Without the aid of the Statute, none of these disabilities would follow the conviction and sentence, as incident to them. The Legislature might have left it discretionary with the Courts, whether to impose these disabilities as a part of their sentence or not. But instead of that, as a part of the punishment, and in many cases the most important part, these disabilities are imposed upon the convict.

It is to be presumed that the framers of the Constitution used the term *pardon* in the sense it had been used in similar instruments, intending to give the Governor the same pardoning power similar executive officers had exercised, subject only to such limitations as the Constitution itself imposed.

Under the common law all offences were pardonable with but few exceptions—such as imprisonment beyond the realm, or where private justice was principally concerned. In the latter case, the prosecutor, as he was to receive a part of the penalty, could release the prosecution. 4 *Black. Com.* 398–9. But as the convict, till pardoned, was civilly dead, all rights acquired during his civil death, whether to his property confiscated or otherwise, would be protected. In cases of attainder, the corruption of blood having descended to his children, then, in *esse*, nothing, it is said, could restore it in them but the transcendent power of Parliament. Yet the culprit himself, by a general pardon, was made a new man, and freed

from all disabilities. 4 *Black. Com.* 402; 3 *John. cases, People* v. *Pease*, 333. Subject to certain limitations, the King's pardon will in all cases restore competency to witnesses, no matter what the offence. 1 *Stark. Ev.* 99. And Phillips says, (1 *Phil. Ev.* 35,) "it is highly expedient a pardon should be allowed to have this effect, and that a discretionary power should be vested in the crown to remove such incapacities. Otherwise, a person once convicted of felony, would be stigmatized for life, and treated as infamous, in Courts of law, though in the opinion of mankind, his character for truth and honesty may have been completely redeemed." Mr. Phillips refers to various authorities, not within my reach; and I have been unable to examine them, to see whether the pardons were granted after the expiration of the sentence. He does not seem however to question the right of the Executive to pardon either before or after. In the case of *The U. S.* v. *Tom Jones*, for murder, tried in the Circuit Court before Justice Thompson, (2 *Wheeler's Crim. Cases*, 451, the question was decided. During the trial, one Oliver King was called as a witness for the prosecution, and was objected to for infamy of character. He had been convicted of grand larceny, sentenced to the Penitentiary, served out his sentence, and was afterwards pardoned by the Governor, expressly for the purpose of making him a witness in the case. Justice Thompson overruled the objection, and said he had no doubt of the efficacy of the pardon, although not granted till after the expiration of the sentence. I feel constrained to follow the opinion of the learned Judge, and more especially as it was expressed in a capital case, where the prisoner was convicted mainly by this witness, and was executed—the learned counsel acquiescing in the opinion without any effort to reverse it. If a pardon will restore a witness' competency, it will also restore the party to his other civil rights.

The next objection to a recovery is, that the facts set up in the declaration constitute a criminal offence, for which, under the Election law of 1841, the defendants would be punishable by imprisonment in the Penitentiary. It is therefore claimed that the civil remedy is merged in the felony. A demurrer to the replication will reach any substantial defect in the declaration. A bad plea is good enough for a bad declaration, and the demurrer reaches back to the first error in substance, though not as to matters of form.

The declaration alleges that defendants, as judges of the election, "wilfully, corruptly and wickedly refused to receive plaintiff's vote," &c. The Election law provides, among other things, that if any

judge shall be guilty of any corrupt conduct, or wilfully neglect to perform any duty enjoined, he shall on conviction be imprisoned in the Penitentiary, &c. It is claimed by defendants that no private injury has been sustained, and if there has, the remedy is merged in the felony.

To our knowledge, it has never yet been decided, that a person cannot recover for private damage where the judges *wilfully* and *corruptly* refused to receive his vote. But the Courts in New York, New Hampshire, and perhaps some other States, have held, that where the judges acted in good faith and without malice, the plaintiff could not recover; while in Massachusetts and in this State, the contrary doctrine has obtained. *Jeffries* v. *Ankeny*, 11 *O. Rep.* 374. The Court seemed inclined to sustain the action even where there was no malice, because the law afforded no other remedy. In such cases there is no other remedy now. If Courts would sustain an action where there was no malice or fraud, *a fortiori*, where there was malice and wilful injury, is the private remedy merged in the felony? A defence of this character was set up in the case of *Boardman* v. *Gore*, 15 *Mass. R.* 335, and counsel referred to a number of authorities to show no civil remedy could arise out of any criminal transaction. Chief Justice Parker, in reviewing these cases says, "they are not decisive on the subject. Some of the Judges, *arguendo*, have urged it was against public policy to permit a party who has suffered by the crime of another to seek a remedy by civil action; because he would be less likely to prosecute and bring to justice the offender. It is a matter of doubt to what extent the doctrine is now admitted in England. It is by no means clear, even in England, that a civil action cannot be maintained for an injury occasioned by the commission of a crime by another. This rule is certainly *not* in force in this country." The learned Judge thinks, if true at all, it was confined to some particular cases, and particularly to those cases where, by the common law, the property of the offender was forfeited to the crown. In such cases actions would be fruitless, for the body could not be taken, and no property could be found. These reasons do not apply with us, and I can see no reason why the crime should preclude the party injured from seeking redress. In the case referred to, Chief Justice Parker says: "Whatever may have been the reason on which the doctrine of the common law was founded, it is evident the reason has ceased with us." The defence is entitled to no favor. It is an acknowledgment that the defendants have wilfully wronged the plaintiff; but, because

in doing so, they committed a Penitentiary offence, they are excused from remunerating the plaintiff for his injuries. The defence is untenable, and ought not to be allowed.

SUPERIOR COURT OF CINCINNATI—BEFORE JUDGE JOHNSTON: JANUARY TERM, 1848.

THE STATE OF OHIO, EX REL. STEPHEN BALL *v.* ANNA HAND.

[REPORTED BY J. W. SHIELDS.]

INFANT—RIGHT OF CUSTODY—HABEAS CORPUS.

THIS was a writ of habeas corpus, brought by Stephen Ball, the father, to obtain possession of his two daughters, one aged eight, and the other six years, from Anna Hand, their maternal grandmother.

The evidence was to the following effect. After the death of his wife, Stephen Ball was residing at the house of his father, with the two children. He had previously come under the influence of the Millerite excitement, almost entirely deserted his work, being a carpenter by trade, and was absent from home for short intervals, being engaged, it was supposed, in preaching the doctrines of his sect. In company with his father, he abandoned his mother and his daughters, leaving them no adequate means of support, and repaired to Cleveland, the great seat of the Millerite excitement. Mrs. Ball, the mother of Stephen, had the charge of the children for a time, but finally took them to Mrs. Hand, alleging that from want of means and health, she was unable to take care of them. Ball, on his return home, expressed no dissatisfaction with the disposition his mother had made of the children. Shortly after this he joined the community of Shakers, and has ever since been one of their number. Ball is hopelessly insolvent, and has no means of support for himself and children, except those derived from the Shakers. He has professed that he cared no more for his children than the children of others, it being his duty to love all men exactly alike. He wished to gain possession of the children, in order to take them with him to the Shaker village. If taken there, they would be placed under the care of the "female care-takers" of the sect, and he would not direct their education or training, but would be allowed to visit them freely at all proper times. A member of the Shakers was

examined as to their doctrines, and, on request of his Honor the Judge, referred him for further information on this subject, to several of their standard works. Ball's moral character was unimpeached; he is amiable, and his children seem to love him; but they expressed their aversion to go with him to the Shaker village. They had once been with him there, on a visit of a few weeks. Mrs. Hand's character is estimable. She keeps a respectable boarding house, generally has a sum of money out at interest, and possesses ample means for the support of the children. She teaches them to love and respect their father, sends them to day and Sunday schools, and provides well for them in all respects.

It also appeared, that at the May term of the Common Pleas, 1848, Mrs Hand was appointed Guardian to the children. The same state of facts had been brought before Judge Morse, and also the Court of Common Pleas, on a writ of habeas corpus, and their judgment was against the petitioner. But as the case was decided by Judge Johnston on the merits, neither these points, nor the arguments of the counsel upon them, will be further noticed in this report.

Chase and Cushing for relator; Collins and Warder for respondent.

Chase and Cushing for relator.

The father is entitled generally to the custody of his children. 2 *Kent, tit. Parent and Child.*

Courts of Justice may, when the morals, safety, or interest of the child demand it *strongly*, remove the custody to others. *Ib.*

The Court can exercise its discretion whether to return the children to plaintiff under all the circumstances of the case.

The first case of importance after Anne's reign, is that of *Mrs. Turberville—Rex* v. *Clarkson*, 1 *Strange* 444.

The second case of note is in precise point. There a female child of nine years old, (Lord Mansfield says six years old—*vide Burr.* 1436) was brought up in custody of her nurse, and it was moved that she be discharged, if under any restraint, which it appeared she was not. Then it was moved, upon producing her father's will, devising the custody of her to her uncle, that she should be delivered up to him as her guardian. The Court at first doubted whether they should go any further than to see that she was under no illegal restraint, and took time until the next day to look into Mrs. Turberville's case, and then declaring that this being the case of a young child, who had no judgment of its own, they ought to deliver her to her guardian, who took possession of her in Court. *Rex* v. *Johnson*, 1 *Strange* 579.

The third case (and these then are the cases from which the authorities date) was that of *Rex* v. *Penelope Smith*, 2 *Strange* 982. The Court laid down the doctrine, that the Court could only deliver from illegal restraint. It declares *Johnson's case* above overruled, and says Lord Raymond repented of what was done in that case. Lord Mansfield (3 *Burr.* 1436) says: "This case (*Rex* v. *Smith*) was petermined right, for the Court were certainly right not to deliver the child to the father." He also says, (which does not appear in the report of the case,) that the Court had "a bad opinion of the father in taking the child." *Vide Loffi Rep.* 748.

In the next great case on record, that of *Rex* v. *Deleval*, 3 *Burr* 1434, Lord Mansfield reviews *all these decisions*, and says they are all right. He objects, though, to the dicta contained in them, especially those in the latter decisions, which overrule *Rex* v. *Johnson*, and establishes that case (though some modern cases seem to have overlooked it) upon firm foundations, by expressly commending the decision. 3 *Burr.* 1436. He also lays down the true principle, which harmonizes all the cases, viz., "*the Court are to judge of the circumstances of the particular case, and give directions accordingly.*"

Since this decision of Lord Mansfield, the current of judicial authority has flowed on in the channel marked out by him. Yet almost all the modern cases seem to speak of *Rex* v. *Johnson* as overruled both by *Rex* v. *Smith* and *Rex* v. *Deleval!* (The case in *Burr.* referred to.)

The following cases are all decided rightly under the principle laid down by Mansfield, and many of them refer to him for authority; but the dicta in some of them are erroneous, owing to mistaken impressions remaining with the Judges, respecting the relative position of the cases, *Rex* v. *Smith* and *Rex* v. *Johnson.* According to *Rex* v. *Deleval, both were right.* 4 *Johns. Chan. Rep.* 80; 2 *Cox* 242; 8 *Johns.* 338; 5 *Binney* 520; 13 *Johns.* 418; 3 *Mason* 428; 6 *Greenl.* 467. These are all professedly decided under the authority of the cases above cited.

The burden of proving the father absolutely unfit to take charge of his child, rests upon the opposite party. In 3 *Mason* 428, Judge Story says, "the presumption of law is, that it is the interest of the child to remain with the father." But the leading case on this point is that of *The King* v. *De Mannerville*, 5 *East.* 219. There it was decided that the father of the child is entitled to the custody of it, though an infant at the breast of its mother, if the Court sees no ground to impute any motive injurious to the health or liberty of the

child. Lord Ellenborough says, "It lies with those who applied for the writ to show that the father was not entitled to the custody of the child. He drew no inference to the disadvantage of the father. *But he is the person entitled by law to the custody of the child.* If he *abuse it*, the court will protect the child."

Lawrence J. is reported to have said, in this case, that where Sir William Murray applied to obtain possession of his child, five years old, from its mother, Lord Kenyon had no doubt but the father was entitled to the custody of the child, unless the Court saw he had a design to abuse his right by sacrificing the child. (See the case 5 *East*, 220.) The last case to which we refer, is that of the *Com.* v. *Wales Briggs*, 16 *Pick.* 220.

Shakerism is no ground for denying this man the custody of his children. The Statute (*Swan* 853) does not embrace him within its provisions. And in this matter the constitutional rule applies, "No preference shall be given to any religious society or mode of worship." *Cons. of Ohio*, *Art.* 8, § 3. Shakers are to be regarded in the same light with *other* Christians. 3 *Greenlf.* 242. Shakers are competent witnesses in this case. 6 *Greenlf.* 57, 3 *Greenlf.* 243; and in *Wells* v. *Lane*, 8 *John.* 462, in a penal action, it was held that one Shaker could testify for another without a release.

Collins & Warder for the respondent contended: That the right of the father to the possession of his minor children is not an absolute right. But, on the contrary, when he applies to a court of justice to enforce it, there is a sound discretion vested in the court to grant or refuse it. And the court, in exercising this discretion, will chiefly regard the *interests* and *welfare* of the children.

The elementary books, in express terms, assert the proposition, that there is a discretion in courts of Justice to control the rights of a father to the possession of his children. *Vide* 1 *Chitty*, *Gen. Prac.* 64; 2 *Kent Com.* 204, 205.

In England all the decisions prior to our own revolution, declare the same doctrine. And, in a question of this kind, we insist that the prior authority must control.

In *Rex* v. *Smith*, 2 *Strange* 982, (A. D. 1735) a boy of thirteen or fourteen years of age, in the custody of his *aunt*, was brought up on a *habeas corpus* sued out by his father. It was held by the court, that they could only deliver the boy out of the custody of his aunt, and inform him he was at liberty to go where he pleased. He chose to remain with her.

In *Rex* v. *Delevel*, 3 *Burr*, 1434, (A. D. 1764) Lord Mansfield

thoroughly examined the cases that had been adjudicated and concluded. "The rule is, that the Court are to judge upon the circumstances of the particular case, and to give their direction accordingly." *S. P. in re Blisset Lofft Rep.* 748, (A. D. 1774.)

In 1804, however, the decisions in England took a different direction. They still maintained that the right of the father might be controlled where the child had property in its own right. 2 *Bligh. Rep. N. O.* 124; 2 *Russ.* 1; 1 *Jacob* 245; 4 *Cond. Eq.* 115. But they refused to extend the principle farther. The result was, that a girl seven or eight years old might be torn from the custody of a mother or aunt, and entrusted to the paramour of her father. This disgraceful condition of the English law was bewailed by her jurists and legislators. The Court is referred to the remarks of Lord Denman (49 *vol. Parl. Deb.* 494,) and of Lord Lyndhurst, (44 *id.* 3d *series*, 174,) cited in the argument of senator Paige, 25 *Wend.* 104, 105. The result was, that sergeant Talfourd, to his immortal honor be it said, in 1839, by act of Parliament, restored the pristine humanity of the English law.

But we are not embarrassed by any serious conflict in the whole current of American decisions. We are not able to find the proposition any where controverted. Even where the right of the father is asserted, the power of the Court is also asserted, and the particular circumstances of the case proved him to be the proper custodian of the child. 6 *Greenlf.* 462. The defendant was the grand-father; the relator was the father. *Per Parris J.* "From an examination of these authorities, I consider the law well settled, that it is in the sound discretion of the Court, to alter the custody of these minor children or not, and that the father cannot claim them as matter of right." The application was refused. 6 *Mass.* 272; 10 *Pick.* 274; *N. Y.* 4 *Johns. Ch. Rep.* 80; 8 *Johns.* 328; 13 *Johns.* 418; 18 *Wend.* 640; 19 *Wend.* 16. The leading case is *Mercein* v. *The People*, 25 *Wend.* 64; *vide Sen. Paige's argument, Ib.* 105. We cite also the celebrated case of *D'Hauteville* v. *D'Hauteville*; 5 *Binney* 520; 1 *Serg. & Raw.* 356. In the Circuit Court of the United States, 3 *Mason* 482, Mr. Justice Story specifically asserts that he will look to the interests of the children, and thereby determine their custodian. The same principle is recognized in France, Civil Code 444. We cannot forbear pushing the principle of the relator's counsel to its conclusion. They assert that our Legislature has no right to make any religious principle a ground for the loss of any civil privilege. We admit that a man, under our constitu-

tion, may embrace any belief, and follow any religious worship whatsoever, *provided it works no injury to the state.* Otherwise the Thugs of India might, in Ohio, train up their children to the religion of assassination. The Hindostan woman might (if transplanted here) claim to sacrifice her babe to some god of the river, or to throw herself upon the funeral pyre of her husband; while another species of fanatics might claim the privilege of being crushed under the car of Juggernaut.

True, we attribute no such monstrous superstitions to the Shakers. But we claim that if Shakerism, or Catholicism, or any other ism, results in a policy adverse to the whole genius of our institutions, *pro tanto*, it may be controlled.

Population is the basis of all society and government. One of the chief ends and aims of the constitutions and laws, is to foster and protect the increase of population. Hence whatever tends to destroy this increase, is contrary to the policy both of the laws and the constitution. For this reason, conditions annexed to gifts, legacies and devizes in restraint of marriage generally, are void, and the gift is to be enjoyed freed from the illegal condition. *Vide* 1 *Story Eq. p.* 286, § 280 *et seq.* and the numerous cases there cited. We, therefore, submit, that it would be alike impolitic and contrary to the fundamental idea of our constitution, and all constitutions, that children of such tender years as these, should be placed in a community to be taught that marriage is a sin, and the natural increase of man, an evil.

Johnston J. There is, perhaps, no principle of the law better settled than this, that the father has a right to the custody of his own children, to protect, feed, clothe, and educate them in his own way.

But this right is conventional, not natural. By the laws of nature, and the analogy of animal economy, the offspring belongs to the mother; and as to all natural children, where there is no responsibile father, the law gives the custody to the mother. But in all civilized countries, the father is by law responsible for the expense of protecting, feeding, clothing, and educating all his children born in lawful wedlock. Out of this obligation, so to provide for them, and correlative to it, arises his right to the custody. But separate from the duty of providing, the right to custody does not exist.

Hence arises the exception of the general rule—that when the father is grossly immoral, intemperate, imbecile, insane, or otherwise disqualified to discharge the obligation of providing, the law will not enforce the right of custody.

This suggests the very delicate question, whether Stephen Ball, the father of these little girls, is so disqualified for the task, as to put him without the pale of the general rule of law, and bring him within the exception. That he is immoral or intemperate, no one pretends. But it is claimed that by his acts and words, and by his connection with the people called Shakers, he has abjured "natural affection;" and that he seeks these children, not to protect, and feed, and clothe, and educate them as a father, but to proselyte them to the peculiar faith, and place them under the care of the Shakers.

At the time these children came to the custody of the defendant, it is pretty clear that he was laboring under mental, if not moral hallucination, carried by religious phrenzy beyond the dominion of reason, so as to expose himself to the withering denunciation of a christian apostle, "if any provide not for his own, and especially for those of his own house, he hath denied the faith, and is worse than an infidel." Deserted by the father, and paternal grandfather, the paternal grandmother, straitened in her means and sinking under ill health, brought these orphans to the maternal grandmother, who took them under her care, and, it is admitted on all hands, has provided well for them ever since. As matters then stood, no body would have disputed her custody of these children.

But it is said that Stephen Ball is now reclaimed from his wanderings, and is willing and able to provide for them, and that to this end he seeks their custody. If this be true to the uttermost, there is no law can stand betwixt him and them.

Let us enquire into his present situation as a member of the society of Shakers.

As a general thing, I have a very poor opinion of all common-property communities, from that formed on the plains of Shinar 4000 years ago, down to the latest phalanx of Fourierism. Their objects may be benevolent, but their tendency is to degenerate and demoralize man. Against this particular community, I have no prejudice. In their favor much may be said. For industry, cleanliness, economy, quiet and orderly behaviour, they are patterns well worthy of imitation: and for a numerous class of persons, soured by disappointment, or crushed by misfortune, or who, by the vices of youth, or the frosts of age, have extinguished or outlived the genial impulses of nature; such communities afford an asylum, not only beyond the reach of want, but beyond the reach of scorn, where they may spend the evening of life in monotonous tranquillity, and comparative happiness. That young people, whether brought

np in or out of the community, are likely to embrace "the doctrines of the cross," as they use the term, I have no serious apprehensions.

With the peculiar faith of the sect, I prefer having nothing to do, further than it affects the present case. Suffice it then, that they abjure all "*natural affection*," and denounce the marriage relation, from whence the objects of natural affection spring, as sinful; so that the relation of parent and child exists not among them. The love of the father and the fondness of the mother give place to the vigilance of the "care-takers."

Suppose, then, that these little girls were delivered over to this plaintiff, and according to his avowed purpose, he should take them with him to the Shaker community, to be protected, fed, clothed, and educated in this peculiar way; what would be the relation between him and them? The bonds of "natural affection" would be cut asunder, to be supplied by the mystic, may I not say the metaphysical tie of universal philanthropy, and the endearing relation of father and daughter dissolve in the cold and distant relation of fraternal brother and sister.

That the ordinary wants of these children would be well supplied in this community, I do not doubt; but not one of these wants would be supplied by Stephen Ball. The testimony shows that he is without means and without credit. He has no means to provide for these children, but the means of the community. He has no bread for them to eat, but the bread of the community. He has no clothes for them to wear, but the clothes of the community; and over their education the "female care-takers," and not Stephen Ball, would preside.

True, as the witness informs us, he would have the privilege of visiting them; the same privilege that he would have of visiting every other man's children, and that every other *old man* would have of visiting his. But he would visit them only to see the "care-takers" control, discipline, and instruct them, not according to his will, but according to the will of the community.

True, as the same witness tells us, he would be allowed to take them away. But this is the privilege the law gives him, and which the courts of justice would enforce, whenever he desired to carry them to a home of his own.

True, as the same witness tells us, the girls, when they arrive at the age of majority, would be allowed to go away if they did not

choose to stay; and I desire to know by what authority they could be restrained of this liberty in our country.

Substantially, then, the community of Shakers is plaintiff to this suit; because the object is to transfer the custody of the children from Mrs. Hand to the care-takers of the community.

True, Stephen Ball is the relator, and nominally the plaintiff; but he does not seek these children that he may rekindle the fire on his desolate hearth, and relink them around it in the family circle. He does not seek them that he may rebuild his family altar and unite with them in consecrating it with the prayers and songs of family devotion. He seeks them that he may sever them from the bosom of their grandmother, and from his own bosom, and plant them in the cold ascetic bosoms of the "female care-takers," and transfer all his right, title and interest in the children which God has given him, to total strangers.

All this might be done by an honest man, and a pure man. But can it be done by a sane man? Does it not argue, at least, a morbid state of the amative and philoprogenitive faculties, bordering on insanity, and totally inconsistent with a rational discharge of parental duty?

Besides, there is some consideration due to the grandmother of these children, who has them in custody. When they were houseless, she took them to her house. When Providence took away their mother, and their father forsook them, she took upon her the duties both of a father and a mother to these orphans; and how faithfully she discharged both, is abundantly proved. If they were domestic animals merely, she would have a lien on them which the claimant would be bound to discharge before he took them away. As it is, she has a sort of moral lien, which I am unwilling to disturb, till I am satisfied that the father has again "put on the bonds of natural affection," and recognizes in his own right the correlative obligations and rights of a father, and the natural relations of parent and child.

The custody then of these children, must remain where it is for the present. The children are too young to choose themselves a home, and the new home proposed for them, is one to be adopted only upon the freest choice.

This conclusion I come to with great difficulty; not that I had any doubts as to what was best in the present case, but because I was very loath to make a decision which looked toward unsettling the well established right of the father to the custody of his children.

[We received the Frankfort (Ky.) Commonwealth of 18th April last, containing the following report. We think that we recognize in the hand writing of the direction on the envelope, that of an old and much esteemed friend, justly distinguished in the profession. It would give us great pleasure, and we know would increase the value of the Journal, to hear often from him.]

JESSAMINE CIRCUIT COURT: MARCH TERM, 1848.—BEFORE THE HON. SAMUEL LUSK, CIRCUIT JUDGE.

CASSIUS M. CLAY, PLAINTIFF, *v.* JAMES B. CLAY AND THOMAS H. WATERS, DEFENDANTS.

FREEDOM OF THE PRESS.

This was an action of trespass *vi et armis*, brought by plaintiff against the defendants, for entering the printing office of the "True American," in the city of Lexington, and taking and carrying away the printing presses, types and other fixtures belonging thereto, and converting the same to the use of the defendants; damages $10,000.

Defendants filed a special plea, in which they alleged in substance, that the plaintiff established said press and issued therefrom a newspaper called the "True American," with the view, and for the purpose of operating on the public mind, and thereby inducing the owners of slaves to emancipate them. That the plaintiff did not discuss the subject of slavery in a temperate and prudent manner, but on the contrary, the tendency of his articles was to inflame the public mind, and hold out hopes to the slaves for unconstitutional emancipation; and also create insubordination amongst the slaves, and an inclination to insurrection: That the value of slave property became less secure and depreciated, whereby the said printing establishment became and was a nuisance, which the citizens of Lexington and Fayette county had the lawful right to abate. And that in pursuance to the request of a large public meeting of the citizens of Fayette and other counties, held the 18th of August, 1845, the defendants and fifty-eight others, acting as a committee of said meeting, repaired to the office of the "True American," took down the presses, types, &c., carefully packed them, and caused the same to be shipped to Cincinnati, subject to the order of the plaintiff.

To this plea the plaintiff demurred. After an elaborate argument as to what constituted a nuisance, and the sanctity of the press, the court sustained the demurrer.

Defendants then offered a second plea similar to the first, but more in detail, embodying therein portions of the articles supposed by them to be intemperate and inflammatory. The court refused permission to file it, and the defendants declining any further defence, the jury were sworn to enquire of damages, and rendered a verdict for $2,500. The defendants appealed, and the only question which the record presents, is as to the validity of the pleas. And that involves the question, whether a printing press can become a *moral nuisance* in consequence of promulgating opinions which a majority of the people in the vicinity in which it may be situated, deem injurious to the peace and good order of society.

James Harlan and Samuel Shy for *plaintiff*; George Robertson and J. E. Spilman for *defendants.*

SUPREME COURT OF DELAWARE.

Rice *v.* Foster.

We learn from the Pennsylvania Law Journal, that in this case, lately decided, and to be published in 4 *Harrington's Reports*, the Supreme Court of Delaware held, in accordance with the views of the Supreme Court of Pa., in a like case, to which we referred in the January number, that "An Act of Assembly, authorizing the people to decide by ballot whether the license to retail intoxicating liquors shall be permitted among them," is unconstitutional and void.

The Court, composed of the Chancellor, Chief Justice, and three Puisne Judges, were unanimous. We regret that we have not room for such extracts from the opinions of the Chief Justice as are given in the Pennsylvania Journal. We hope to advert to this in our next.

NOTES OF RECENT DECISIONS.

English Chancery, Nov. 1847. *Gibbons* v. *the Board of the N. E. M. Asylum.* [*L. J. Rep.* 5.]

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—CONTRACT.

The defendants' agent, by letter addressed and sent to the plaintiff's agent, stated that he was directed to offer a sum of £3,000 for certain freehold property and effects belonging to the plaintiff. The plaintiff's agent, by his letter in answer thereto, stated that he accepted the offer for the property and effects; at the same time adding, "If you approve of the enclosed, sign the same, and on receipt of the deposit we will sign you a copy." That letter contained a memorandum in writing, which was not produced, and no evidence was adduced on either side to show the nature or particulars of it: Held, on bill filed by the vendor against the purchasers for specific performance, that there was a binding contract, and a reference was directed to inquire into the title to the freehold property, the principal subject of the contract.

Queen's Bench, Nov. 1847. *Doe d. Basto* v. *Cox.* [17 *L. J. Rep.* 3.]

LANDLORD AND TENANT—TENANCY AT WILL—NOTICE TO QUIT.

A, under a mortgage deed, agreed to become tenant to B, of the premises demised, "henceforth at the will and pleasure of B, at the yearly rent of £25 4*s.* payable quarterly:" Held, that this was a tenancy at will; and that occupation for two years, and payment of rent under the agreement, did not make B tenant from year to year.

Queen's Bench, Nov. 1847. *Bowen* v. *Owen.* [*Ib.* 5.]

TENDER—CONDITION—EVIDENCE.

Plaintiff being tenant to the defendant at the yearly rent of £52, sent a person to him with the following letter: "I have sent by the bearer £26 5*s.* 7½*d*, to settle one year's rent." The defendant refused to take it, saying that more was due. No question was left to the jury. Held that the tender was sufficient.

Queen's Bench, Nov. 1847. *In re Preston.* [*Ib.* 21.]

HABEAS CORPUS—INFANT—GUARDIAN—POWER OF ATTORNEY.

Upon an infant, a boy of the age of nine years, being brought up before the Court by habeas corpus, it appeared that upon the occasion of her husband's death, the mother then residing in India, gave over the child into the care of her late husband's mother, who subsequently died, leaving all her property to this grandchild and his brother, and appointing two persons her trustees and executors, and the guardians of the child. These persons acted, and had continued to act, as guardians, and were recognized as such, and approved of by the mother, and their conduct as guardians was not impeached in any way. She, however, marrying again, and still residing in India, suddenly executed, conjointly with her husband, a warrant of attorney, authorizing certain parties, therein named, to demand and receive the custody of the

child. This demand had been made upon and refused by the guardian, and in consequence of such refusal, application was made, under this warrant of attorney, for the habeas corpus. Under these circumstances, the Court refused to disturb the custody of the child.

Semble—that a party who is of right entitled to the custody of an infant, cannot, by warrant of attorney, empower another person to apply to this Court to change the custody.

Eng. Com. Pleas, June, 1846. *Cleft* v. *Schwabe.* [17 *L. J. Rep.* 2.]

LIFE INSURANCE—POLICY, CONSTRUCTION OF—"COMMIT SUICIDE"—RESPONSIBLE MORAL AGENT.

To an action upon a policy of insurance, effected by S, on his own life, expressed to be subject to a condition that the policy should be void if the assured should commit suicide, or die by duelling, or the hands of justice, the defendants (the insurance office) pleaded that S did commit suicide. It was proved that S died by reason of having taken sulphuric acid voluntarily, and for the purpose of killing himself, being at the time of unsound mind.

The Judge directed the jury, that to find for the defendants, the jury must be satisfied "that S died by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act so as to be a responsible moral agent."

On a bill of exceptions it was held, in the Exchequer Chamber, by Parke, B., Alderson, B., Patteson, J., and Rolfe, B., that the direction, as to the necessity of S being a responsible moral agent, and capable of distinguishing between right and wrong, was erroneous, the terms in the policy, "commit suicide," including all cases of voluntary self-destruction, whether felonious or not, (dissentientibus Pollock, C. B., and Wightman, J.)

Exchequer of Pleas, Nov. 1847. *Spindler* v. *Grellet.* [17 *L. J. Rep.* 6.]

PROMISSORY NOTE—WHEN PAYABLE AT PARTICULAR PLACE—PRESENTMENT.

The declaration, alleging that the defendant made his promissory note, and thereby promised to pay the plaintiff, by name and addition of Miss Jessie Hope, at 10, Duncan street, Edinburgh, the sum of, &c. Averment, that the plaintiff, when and since the said sum became due and payable, was always ready and willing to receive the said sum according to the tenor and effect of the said note, of which the defendant had notice, yet, &c. On general demurrer, held, that this was a note payable at a particular place, and that the declaration was bad for want of an averment of presentment for payment there.

Exchequer of Pleas, Nov. 1847. *Shaw* v. *Kay.* [17 *L. J. Rep.* 17.]

LEASE, COMMENCEMENT AND EXECUTION OF—COVENANT TO REPAIR.

Where a lease is executed on a certain day, *habendum* from a previous day, the tenant who has entered between the two days is not liable on the covenant to repair for breaches committed during the interval.

Exchequer of Pleas, Nov. 1847. *Black* v. *Baxendale.* [17 *L. J. R.* 50.]

LIABITITY OF CARRIER—DAMAGES—JURY.

The plaintiff sent goods to the London warehouse of the defendants, who were carriers, to be forwarded to Bedford. The goods, which ought to have reached Bed-

ford in time for Saturday's market, did not arrive there until Monday. The plaintiff's clerk, who had been sent to Bedford on Saturday to receive and sell the goods, waited there until the Monday, when he removed them to St. Neots, in order to sell them. Held, that it was a question for the jury, whether the expenses of the clerk's stay at Bedford were a reasonable consequence of the defendants' breach of contract, and that the Judge was not bound, as a matter of law to direct the jury that the defendants were not liable for such expenses, unless they had notice that it would be the consequence of a delay in the delivery of the goods.

Exchequer of Pleas, Nov. 1847. *Suker* v. *Neale.* [17 *L. J. R.* 56.]

ALTERATION OF RECORD.

A declaration on a bill of exchange stated it to be payable at three months, and contained counts for goods sold and delivered and on an account stated. The bill, as produced at the trial, was made payable at two months, and on the record being referred to, appeared payable in like manner at two months, but the word "two" in the record, had been written on an erasure.

The plaintiffs having obtained a verdict, the Court set aside the record and all subsequent proceedings, refusing leave to the plaintiffs to retain their verdict on the account stated.

English Chancery, Nov. 1847. *The London and Provincial Law Assurance Society* v. *The London and Provincial Joint-stock Life Assurance Company.* [17 *L. J. Rep.* 37.]

COMPANY, COLORABLE IMITATION OF NAME OF—INJUNCTION—INJURY TO PLAINTIFF.

Motion for injunction to restrain the defendants from using the first three words in the title of their Company, refused upon the ground that no injury was likely to accrue to the plaintiffs,

English Chancery, Nov. 1847. *Haddan* v. *Smith.* [17 *L. J. Rep.* 43.]

PATENT—PLEADING—DEMURRER.

The plaintiff granted a license to the defendant to use two patents, upon payment of certain royalties. The plaintiff afterwards put in a disclaimer as to part of his patent. The defendant refused to continue paying the royalties, on the ground that the license was void. The bill prayed an account of royalties under the license; and in case the defendant should dispute the plaintiff's right to payment by reason of the invalidity of the patent or otherwise, then that the defendant might be restrained from continuing to manufacture articles the subject of the patent. Held, upon demurrer, that if the license were void, and the defendants were not bound to account, they ought to be restrained from acting without the authority of the plaintiff. Demurrer overruled.

English Chancery, Nov. 1847. *In re Morrison.* [17 *L. J. Rep.* 44.]

INFANT—PAYMENT OF DIVIDENDS—FOREIGN GUARDIAN.

Upon petition presented on behalf of an infant, who was residing with her guardian in America, and who was entitled to a sum of money, which had been paid into Court for her benefit, an order was made that the dividends of the said sum should be paid to an officer of this Court, by whom it should be paid over to her guardian.

English Chancery, Dec. 1847. *In re Forshaw.* [17 *L. J. Rep.* 61.]

SOLICITOR—LIEN UPON PAPERS.

A firm of two solicitors transacted business for a client till November 1843, after which time the firm joined with them another partner; and the firm of three then transacted further business for their client. Held, that the partnership of three had no lien upon papers which came, for the first time, into their possession, for costs due in respect of business done by the original firm of two.

English Common Pleas, June, 1847. *Rickets* v. *Bennett.* [*Ib.* 17.]

MINE—COMPANY—LIABILITY OF CO-ADVENTURERS.

A, one of many co-adventurers in a mine, assumed the entire management of it, and, without the direction of his co-adventurers, opened an account with a banker in the name of the adventurers, and overdrew that account to a considerable amount. In assumpsit by the bankers against B & F, two of A's co-adventurers in the mine for the balance of their account,—Held, that there was no implied authority to one adventurer from his co-adventurers in a mine to pledge their credit for money borrowed by him for the purposes of the mine.

English Common Pleas, June, 1847. *Benham* v. *Gray.* [*Ib.* 50.]

TRESPASS—PARTNERSHIP AT WILL.

The plaintiff and the defendant carried on business as partners on the plaintiff's premises. The duration and terms of the partnership were not definitely settled. On the 26th of December, the plaintiff served the defendant with a notice of dissolution. On the 2d of January, the defendant broke and entered the shop, &c. of the plaintiff, where the partnership concerns were carried on and the books kept, for which entry the plaintiff declared in trespass, and the defendant pleaded not possessed. Held, that the plaintiff was entitled to recover.

A partnership at will exists between A & B, the business being carried on, on the premises of A. Such partnership is put an end to by a notice of dissolution, and A can maintain trespass for a subsequent entry by B on that part of his premises where the partnership business had been transacted.

English Common Pleas, Nov. 1847. *Rodgers* v. *Nowill.* [*Ib.* 52.]

ACTION ON THE CASE—FRAUDULENT USE OF TRADE MARK—ARREST OF JUDGMENT.

The declaration stated that the plaintiffs, manufacturers of cutlery, were accustomed to mark their knives with certain marks denoting their manufacture, and that the defendants, intending to injure the plaintiffs, did fraudulently impose similar marks on knives made by the defendants, to induce the public to believe that the knives made by the defendants were manufactured by the plaintiffs, &c. Held, that it was properly left to the jury to consider, whether there was such a resemblance between the defendants' marks and those used by the plaintiffs, as was calculated to deceive the public; and whether the defendants used the marks with an intention to deceive.

No person has a right to sell his own goods as and for goods manufactured by another person.

That the damage is too generally stated in the declaration, is no ground for arresting the judgment.

Queen's Bench, Nov. 1847. *Regina* v. *Chadwick.* [10 *Law Rep.* 458.]

WHO MAY NOT MARRY—BIGAMY.

One cannot be indicted for bigamy, who had been thrice married, but whose first wife died before either of the subsequent marriages, and whose second wife was the sister of his first wife.

District Court of the United States: Alabama, 1847. [7 *Pa. L. J.* 166.]

RAILROAD BONDS.

A Railroad Company, which by their charter was authorized "to borrow money, contract debts, and be contracted with upon the credit of the stock thereof, and to pledge personal or real estate for the payment of their debts," in order to secure the repayment of certain sums borrowed, gave bonds, in which they pledge "all their estate, both real and personal, their road, their stock and profits." Held, that these bonds were to be considered as mortgages, and governed by the laws applicable to mortgages; that as between the holders of the bonds and the Railroad Company, the lien is not lost, if the bonds remain unrecorded, and that the same rule exists in regard to creditors or subsequent purchasers, *with notice.*

District Court of the United States, Nov. 1847. *Fowle* v. *Spear.* [7 *Pa. Law Journal* 176.]

A Court of Equity will not, in a contest between persons who profess to be manufacturers of *quack* medicines, interfere to protect the use of trade marks by injunction.

A complainant, whose business is imposition, cannot invoke the aid of Equity against a piracy of trade-marks.

Supreme Court of Pennsylvania, Dec. 1847. *Trustees of St. Michael's Church* v. *The County of Philadelphia.* [7 *Pa. Law Jour.* 181.]

MOB—PERSON—NOTICE—DAMAGE.

The words *person* or *persons*, as used in the Act of Assembly of May 31, 1841, include as well, corporations for religious purpooses, as individuals.

Upon knowledge of an intention to attack or destroy his property, it is the duty of the plaintiff or of his agent duly constituted for that purpose, if sufficient time intervenes, to give notice to an officer designated in the act; and such notice must be in writing. Wherever notice is required under a statute, *written notice* is to be understood.

Mere apprehension of an attack, is not sufficient to deprive the plaintiff of the benefits of the statute: knowledge of a contemplated attack must be brought home to him: and it must also be proved that a sufficient time elapsed to permit notice to be given to the proper officer.

The measure of damages is the value of the property destroyed, to which it would be proper for the jury to add interest from the time of destruction.

Miscellaneous.

JOHN QUINCY ADAMS.

The news of the death of Mr. ADAMS, at the capitol, spread with lightning velocity over the country, exciting a profound sensation.

The citizens of Cincinnati, in public meeting assembled, resolved to testify by appropriate public ceremonies, the respect and regard of the whole people for the life and character of Mr. Adams, so that all might "draw from the sublime example of such a life and death, the impressive lessons which they ought to teach." The Oration was delivered by Judge WALKER. Upon the invitation of the Bar of Cincinnati, WILLIAM GREENE, Esq. also delivered an Oration worthy of the occasion. It is impossible for us to notice the many tributes of respect to Mr. Adams: indeed, it does not properly come within our province to do so, but it is within our rule, and we desire, to give our readers a brief sketch of the life and character of this great man; and without consulting our associate Editor, we have deemed it perfectly proper to draw upon his Oration by extracts, for such facts and remarks as we think necessary for that purpose.

"The angel of death, ever hovering over these regions of mortality, to execute his dread commission from the Almighty Throne, has struck down the most aged, the most venerable, and the most illustrious of our public servants, John Quincy Adams. *Dust thou art, and unto dust shalt thou return*, This inexorable fiat, pronounced upon all the human race, has taken him from among the living. So far as such a man can die, he died on the morning of the 23d of February last. To him, in his last sublime and solemn words, *that was the end of earth, and he was content!* His work was done, his audit closed, and the balance struck for time and eternity. *Blessed are the dead that die in the Lord; for they rest from their labors, nnd their works do follow them!* Yes—that weather-beaten, toil-worn frame now rests from its labors, in the last long repose; while the ever living soul, fraught with riches of wisdom seldom acquired on earth, has winged its flight to the Father of Spirits.

"But why are we therefore met here together? What is this man's death to us? Was he of our kindred? No. Few of us, perchance, had ever spoken to him. With none, probably, had he consanguinity. Nor is it simply because another man has died—another drop been taken from the great ocean of existence; for death, as Hamlet says, is *common*—the most common as well as certain of all events. Oftener than our own pulse throbs, the pulse of some other mortal, somewhere on the globe, ceases to throb. Every second of time bears witness to the extinction of some human life. What then is a single unit in this mighty sum? More are born than die; and the procession of the generations goes on increasing.

"What then is this particular death to us? Did it occur prematurely? No. The deceased was in his eighty-first year—far past the ordinary goal. The shock of corn was fully ripe for the harvest. It was time for such a man to die. He had fulfilled his great mission, and was waiting for his recall.

"And the place—who would have wished such a man to die elsewhere? He fell in the nation's capitol, at his post of duty, in the very act, probably, of rising to make some motion. As the great Chatham fell, so he fell—surrounded by his peers, if peers he had—say rather, surrounded by the nation's representatives. He fell then

in the place where such a man should fall—where, it is said, he had expressed a wish to fall. The veteran warrior died on his battle-field.

"The manner too—what else could have been desired? No drivelling decrepitude—no lingering agony—no gradual sinking into a second childhood. The giant oak was struck down at once by a bolt from heaven. None had to gaze upon a slowly crumbling ruin. None will remember him as a worn-out imbecile. He was all himself, while conscious of being. He died then as he might well have prayed to die. And, whether we look to the time, place, or manner, we may borrow the language of an ancient author whom he loved to quote—*Felix non vitae tantum claritate sed etiam opportunitate mortis.** Had it been the will of Heaven to impress our rulers, at this momentous crisis in our public affairs—when matters of such grave and solemn import were depending before them—with the deepest possible sense of the awful reponsibilities under which they were acting—what event so suitable as this? Their NESTOR struck down in their very presence—their PATRIARCH summoned from their midst before the bar of Jehovah! * * * * *

"John Quincy Adams was born at Braintree, now Quincy, Massachusetts, on the 11th of July, 1767, just on the eve of the great struggle for Independence. The first sounds he heard were of resistance to TYRANNY; the first ideas he formed were of the sacredness of LIBERTY. The RIGHTS OF MAN formed the fireside theme of his parents; and such parents!—truly a matchless pair! But on them I must not dwell, further than to say, that if the elements of a lofty character could be hereditary, the son would have inherited them by a double descent: for his father was not greater among the men of that day, than was his mother among the women. Both were pre-eminent in an age of greatness. Fortunate child, to have received his first lessons from such teachers. Fortunate parents, to have had such a child to teach! And rare as fortunate! The instance of the elder and younger Pitt at once occurs to us; but where shall we find another parallel? In what other tomb do the ashes of such a father and son sleep side by side?

"From the age of eleven to that of eighteen, the son was, for the most part, abroad with his father, in his successive missions to France, Holland, and England, where he enjoyed the benefit of the best schools in Europe, and was a close and devoted student. While only fourteen, he was private Secretary to Francis Dana, our Minister to Russia—a case of precocious ability almost without example. In all these places, his position necessarily brought him into acquaintance with all the great men of the day: and in London, he had the inestimable advantage, at that impressible age, of listening to some of the most splendid efforts of Pitt, Fox, Burke, and Sheridan. These seven years were emphatically his forming period. To no youth, perhaps, did it ever occur, to have such rich and various opportunities for a complete and thorough education, as he now enjoyed. And he made the most of them, and then and there laid the foundation of a scholarship so nearly universal, that, in regard to the wonderful diversity of his erudition, it may well be doubted whether, at the time of his death, the world contained his superior. Without enlarging upon this topic, I would, once for all, point your attention to the prodigious depth and variety of his learning, as one of the most unique features in his character—so very little of the vast field of knowledge did he leave unexplored.

"And now, at the age of eighteen, he returns from Europe, a finished man in all but years. Entering an advanced class in Harvard University, he was graduated at twenty, with distinguished honors. This was in the memorable year 1787—the year of the formation of our National Constitution, and almost the very day of the enactment of that celebrated Ordinance, which formed the first law of this North Western

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* Fortunate not only in the renown of his life, but also in the circumstances of his death.

Territory. Think of this fact: for what in the history of the world's progress is like it? John Quincy Adams was a college graduate before the Federal Constitution was finished, and while the State of Ohio was an unbroken wilderness!—that State, which, in 1843, when he for the first time saw it, at the age of seventy-six, made his journey through it more than a Roman ovation—so deep was the veneration, and so fervent the love of its two millions of inhabitants for the patriot sage. Of that visit Mr. Adams has often since spoken, as one of the most gratifying events of his life. He had once urged Congress in vain to 'build a light-house of the skies;' for there were Constitutional scruples. He came here to lay the corner stone of one—the first in the world erected on private subscription—against which there could be no Constitutional scruples. From the desk where I now speak, he delivered his last formal Discourse.* And *Mount Adams*—so called for him—a name now thrice hallowed by his death—looking down upon this fair city at its base, will keep his name in the perpetual remembrance of our citizens to the latest posterity—

Clarum et venerabile nomen gentibus,
Et multum nostrae quod proderat urbi†

"The next seven years, from the age of twenty to twenty-seven, were dvoted to the study, and, to a very limited extent, the practice of law. His preceptor was the late Chief Justice Parsons, then at the head of the Massachusetts bar, and afterwards regarded by the profession as the American Coke. And such was the opinion of his acquirements in jurisprudence, made in this short period, that in 1811, while in Russia, he received from Madison an appointment to the Supreme Bench of the United States, which he saw fit to decline. On a recent occasion, the case of the Amistad slaves, in 1841, he appeared as an advocate before that Court, where, thirty years before, he had refused to sit as Judge. And how eloquently and triumphantly he there vindicated the rights of man, down-trodden in these poor slaves, you all have heard. That high tribunal never witnessed a scene of greater interest, than when he pronounced the peroration of that speech—when he appealed to that Court as a Court of "*Justice*"—Justice as defined two thousand years ago to be "the constant and perpetual will to secure to every one his own right"—Justice, we may add, as illustrated by his own righteous life. After one of the most massive arguments ever pronounced in that arena of great efforts, he there took a final leave of that Court and Bar, where his name had been enrolled as an attorney in 1804, and where he had once before appeared as an advocate in 1809, by paying a thrilling and beautiful tribute to the virtues of their illustrious dead.

"In 1794, at the age of twenty-seven, he entered upon that public official career, which for the last fifty-four years occupied all his energies. In that year, he was appointed by Washington, Minister to the Netherlands, a post to which he was recommended by Jefferson, who had made his acquaintance as a youth in Paris. But probably the immediate cause of this appointment was the publication of some articles signed "*Marcellus*," known to be from his pen, upon those infamous appeals, made to the people of this then infant Republic. by the French Minister, Genet, with the

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* How strikingly applicable to himself are the concluding words of that last Discourse:

"Man issues from the hand of his Maker a frail and imperfect being. His life begins in helpless infancy, and closes with the clods of the valley. Evils, physical, moral, and intellectual, beset his path from the cradle to the grave, and warn him that his condition here on earth is a state of probation to fit him for a fairer and better world. Still, in wending his toilsome way, every step in the progress of improvement in his condition, approximates him to the boundary where sorrow and grief are unknown, and where his spirit finds that which was denied him on earth. In pursuit of happiness, were his hands to be mannacled and tied? How absurd this question must appear to you! Yet read the history of your race and see!"

† A name renowned and venerable among the nations, and which has greatly benefited our city.

design of embroiling this country in the frightful scenes of the first French Revolution; in which he foreshadowed that profoundly wise neutral policy, which Washington afterwards pursued. For several years he remained abroad on diplomatic business. For Washington again appointed him Minister to Portugal, just at the close of his administration; but before he reached Lisbon, he received from his father the appointment of Minister to Prussia, and afterwards that of Commissioner to negotiate a commercial treaty with Sweden.

"Shortly after his return to the United States, in 1801, he was elected to the Senate of Massachusetts, in which body he had been but a short time, when he was elected to the Senate of the United States. While a member of that body, he was appointed Professor of Rhetoric and Oratory in Harvard University; and in the recess delivered a course of Lectures to thronged audiences, which have since been published in two octavo volumes, and evince a thorough mastery of the theory of that art, which he has since so signally illustrated in practice. While in the Senate, he gave an early proof of that moral firmness which has since so remarkably characterized his whole career. He took a course upon the Embargo question, which subjected him to the censure of the Massachusetts Legislature; whereupon he at once resigned his seat, nearly a year before the expiration of his term. But no sooner was Madison installed in the Presidential chair, than he selected Mr. Adams for the mission to Russia. During the four years of his residence at St. Petersburg, he is believed to have exerted an important agency in those mighty movements to check the career of Napoleon towards universal dominion, which resulted in his exile to St. Helena; and to such a degree did he acquire the respect and confidence of Alexander, as to induce that potentate to offer his mediation between Great Britain and the United States, to terminate the then pending war. He was shortly after placed at the head of the Commission to negotiate the treaty of peace which was concluded at Ghent, in 1814. The next year he was appointed Minister to England, where he remained until called home, in 1817, to take the head of Monroe's Cabinet, as Secretary of State; which place he filled during the whole of that administration. At its close, there being no election by the popular vote, he was elected to the Presidency by the House of Representatives. At the end of the first term, failing to be re-elected, like his great father before him, he retired, in 1829, to the shades of Quincy. After the repose of a year, as a private citizen, he was nine times successively elected to represent his native District in Congress. From that post his Heavenly Father called him home; and the blessings of twenty millions of his countrymen have followed his emancipated spirit to the mansions of eternal rest.

"WELL DONE, GOOD AND FAITHFUL SERVANT. When shall we look upon thy like again? Who, of these twenty millions, can fill the place which thou hast filled, or do the work which thou hast done? ENTER THOU INTO THE JOY OF THY LORD. * *

"The manners of Mr. Adams were the extreme of republican simplicity. He seemed, by his carriage, to be wholly unconscious that he was a great man. Meet him where you might, he exacted no deference; but treated all well-behaved persons as his equals. Even while President, he made his journeys with no parade whatever. He was habitually grave and serious in his demeanor; but among kindred spirits, when public cares did not press upon him, could unbend himself to the most genial and delightful companionship. In mere fashionable society he took little or no interest, and often wore the appearance of entire abstraction. When in a talkative mood, he had an inexhaustible fund of personal anecdote, which made his conversation as instructive as it was entertaining. But he never monopolized conversation, and required rather to be drawn out, than took the lead. For foppery and pretension of every sort, he had a supreme contempt, which he did not always entirely conceal; yet he was as far as possible from being an ill-natured man. Modest merit

he delighted to find out and encourage. He never courted any one. While always ready to pay or receive a graceful and well deserved compliment, he despised flattery, and would neither use nor suffer it. On the whole, his manners were rather the reverse of fascinating. But this is partly owing to the grave and severe studies, which so absorbed his thoughts. And to make up for this, he was a sincere and earnest philanthropist—an ardent lover of his whole race. His occasional discourses are full of the spirit of human brotherhood. But it was for the oppressed, that his sympathies were most deeply excited. To injustice, under all forms, he was a stern, almost a vindictive foe; and his severe denunciations have led some to consider him a hard man—implacable in his enmities—and not sufficiently tempering justice with mercy. There may be some grains of truth in this. He was born and reared under circumstances so auspicious, and had led so pure a life, that he may not always have made a sufficient allowance for a less favored lot. Still was he a man of world-wide sympathies. He never hated men, but only their hateful deeds. Had he left no memorials but those which demonstrate his deep compassion for the slave—always manifested with an austere regard, however, to the rights of the master secured to him by the Constitution—posterity would have no scruples in pronouncing him a philanthropist. For no mere politician would utter the words, and do the deeds, and bear the obloquy, which he has done—at least no politician of the most recent type;—because the popular breeze does not yet set in that direction.

"We have seen that Mr. Adams was educated for the Bar, but chiefly withdrawn from it at the end of seven years. And I have heard him express doubts whether his life would not have been happier, if he had remained in that profession. That he might have attained the highest rank, both as a Jurist and Advocate, there is no room to doubt. For a Jurist, he possessed a piercing discrimination, which seized at a glance the nicest distinctions; and a tenaciousness of memory, which, coupled with his untiring industry, would have made his mind a perfect magazine of precedents. And for an Advocate, he possessed a copiousness of diction, which summoned the best words at will; a clearness of method, which made his logic look like demonstration; a vividness of imagination, which could illuminate and enliven the darkest and dryest subjects; a power of invective before which knavery must have quailed; and a weight of character, which always must have a commanding influence both with Judge and Jury. But why speculate on this point? Who has not heard of him as '*the old man eloquent?*' It was, however, his destiny to become greatly conspicuous in connexion with only the two highest branches of law—Constitutional and International—and of these he was an acknowledged master.

"His views of the Constitution have been characterized as *ultra liberal.* And it is true, I believe, that he did go farther, in this respect, then any other eminent statesman. Whether he was right or wrong in this, I shall not now enquire. If wrong, the error was at least a generous one. For most assuredly, if the words of the Constitution would warrant his construction—if there really were granted, by that instrument, to the federal government, the broad and substantive power to promote the "*general welfare*," in all useful ways,—whether it be by constructing works of internal improvement,—or by creating and endowing a National University, or Observatory—or by doing any other great and good thing, tending to the manifest benefit of the whole Union,—and which the nation can never hope to have from any other source—I say, most assuredly, such a constitution would be a far more efficient and beneficent instrument for building up, and beautifying, and blessing a nation, than one which contained no such general power. And, may I not add, that such a constitution would be more worthy of the sages who framed it? For they were as patriotic as they were wise.

"Great were the HEARTS, and strong the minds,
"Of those who framed, in high debate,
"The immortal league of LOVE that binds
"Our fair, broad Empire, State with State,"

"But it was in the department of International law, that Mr. Adams labored most; and here—though I wish to avoid all extravagance of panegyric—I feel no scruple in saying, that he had no living rival. Before he had been engaged four years in Diplomacy, Washington spoke of him "as the most valuable public character we have abroad, and the ablest of all our diplomatic corps." If this were deserved then, what might not have been said, when he had more than quadrupled his diplomatic experience? The truth is, that so far as our international relations are made certain by treaties, they are, to a very great extent, the actual work of his hand; and, so far as they remain unwritten, and resting upon those eternal principles of right, which are recognized throughout Christendom as the law of nations, it is enough to say, that these subjects have been pre-eminently the study of his life. As a Publicist, then, whether we regard his astonishingly minute acquaintance with the actual relations which have been established among the great powers of the world; or his profound study of those principles and precedents which must determine those relations in any future contingency not provided for by treaty—in either aspect, his fame will be as enduring as the nations themselves.

"But that portion of his life which I most love to contemplate, is the last seventeen years, during which he was a member of the lower House of Congress. When, after a most brilliant public career of thirty-six years, during which he had successively filled nearly all the high offices in the gift of his country—when he had just left the highest elective office in the world, at the age of sixty-three, an age at which most men wish and need repose—when he condescended to step down from this proud eminence—give up the dignified retirement in which the evening of his life might have glided so tranquilly away—take his place in that arena where embryo statesmen usually seek to flesh their maiden swords—and there, asking no favors on account of advanced age or past services, fight the battles of debate on equal terms, for seventeen years, with every champion who chose to encounter him, without once being overthrown—this portion of his life having no similitude in that of any other American, to my mind, places a more than Corinthian capital upon the already stately column of his glory. And when I think of the stormy times upon which our beloved country may now be entering, in which his venerable presence and counsel will be wanting, I cannot help recalling those strong lines by Scott upon the younger Pitt:

"Hadst thou but lived, though stripp'd of power,
"A watchman on the lonely tower,
"Thy thrilling trump had roused the land,
"When fraud or danger was at hand;
"By thee, as by the beacon light,
"Our pilots had kept course aright;
"As some proud column, though alone,
"Thy strength had propp'd the tottering throne.
"Now is the stately column broke,
"The beacon light is quenched in smoke,
"The trumpet's silver sound is still,
"The warder silent on the hill!
"O think how, to his latest day,
"When death, just hovering, claimed his prey,
"With Palinure's unaltered mood.
"Firm at his dangerous post he stood;
"Each call for needful rest repell'd,
"With dying hand the rudder held,
"Till, in his fall, with fateful sway,
"The steerage of the realm gave way."

"Another topic which I should be glad to dwell upon, but can only mention, is his reverence for the freedom of opinion. This precious right, which he always claimed for himself, he scrupulously respected in others. As was beautifully said by one of

his eulogists in Congress—"He crushed no heart beneath the rude grasp of proscription; he left no heritage of widows' cries and orphans' tears." The frightful doctrine of proscription for opinion's sake—so sure to make politicians hypocrites, and office-holders slaves, and therefore so fraught with danger to our liberties—finds no countenance in his great example. He recognized no party fealty which put fetters on the mind. Thought is free. What he thought, he would and did speak; and he trusted no man who would not do the same.

"I have already spoken of Mr. Adams as a Christian. I may here add that he was so from profound study. His critical knowledge of the Bible fell little short of that of the most accomplished divines. In a letter to his son, written at St. Petersburgh in 1811, and first published since his death, he says:

"I have myself, for many years, made it a practice to read through the Bible once "every year. * * * My custom is, to read four or five chapters "every morning, immediately after rising from my bed. It employs about an hour "of my time, and seems to me the most suitable manner of beginning the day. * " * * In what light so ever we regard it, [the Bible,] whether with "reference to Revelation, to Literature, to History, or to Morality, it is an invaluable "and inexhaustible mine of knowledge and virtue."

"I have made these quotations to show the source to which he went for the wisdom which he evinced. Richelieu is represented to have said, "For private life, Scripture the guide; for public, Machiavel." And this has been the acted, if not the uttered maxim, of many a statesman besides Richelieu. Is it not the prevailing maxim now, both with European and American statesmen? Do they not hold reasons of state, and reasons of right, to be different things? In a word, is the Bible the statesman's guide? Is the moral code of the politician the same which he himself would follow as a private citizen? Alas, we know that it is not. But with Mr. Adams there was no difference. In public as in private life, he always consulted the Bible, and never Machiavel. I do not, of course, mean to say that he always acted rightly. But he endeavored so to act. He studied and he prayed so to act. This was not his profession merely, but his daily practice. He aimed to be a CHRISTIAN STATESMAN. And I regard this as the resplendent glory of his life. No earthly consideration ever could or did make him swerve from what he thought to be his duty. For this I reverence him, and my reverence is all the deeper—amounting to hero-worship—because, in this respect, he stood almost alone. "Modern degeneracy had not reached him." He recognized no distinction between honesty and policy. To the wrong nothing could lure him—from the right nothing frighten him.

"Who does not remember, with a thrill of admiration, how that venerable old man—that white-haired public servant—when, in order to vindicate the sacred right of petition, he had offered one which was obnoxious to a fiery portion of the house, who forthwith poured upon him a whole vocabulary of vile abuse, and even moved his expulsion—yes, moved the expulsion of John Quincy Adams from the House of Representatives, where he occupied a position as far above them, as the summit of Olympus is above the vale beneath; who does not remember how he stood there in the calm majesty of truth and justice, a moral Samson among Philistines—a Titan among Pigmies—immoveable as a rock, lashed by the angry surge—smiling with that ineffable mixture of scorn and pity, which only the truly great can feel, at the puny efforts made to disgrace him; and, at length, when the time to speak arrived, making one of those triumphant vindications of his conduct, which from that time forth forever has consecrated the right of every human being to be heard by a respectful petition. Not Ajax defying the storm—not Marius among the ruins of Carthage—not Socrates in his dungeon—not Cincinnatus, nor Coriolanus, contemning the rabble—not the Roman Senators in the presence of Brennus—may I

say, not Paul before Agrippa—presented a scene for the painter grander than this. It was Right defying Might—Justice proclaiming its title to Supremacy—Faith fastening itself to the Rock of Ages—Truth vindicating its eternal sway. Tell me not of Chatham's hours of "Supreme Dominion" over the House of Lords. Never was there an hour of dominion like this over a deliberative Assembly.

Justum et tenacem propositi virum
Non civium ardor prava jubentium,
Non vultus instantis tyranni,
Mente quatit solida.*

Then and there did John Quincy Adams approve himself the moral hero of this age.

"To sum up then, this very imperfect sketch of the life and character of John Quincy Adams, thus much, I think, may be truly said. In the beginning, nature was most bountiful to him; for she gave him—all she had to give—a sound mind in a sound body. His opportunities for education at home and abroad, were the very best the world afforded. These great resources at the outset, he husbanded through life, as carefully as does a miser his gold, and thus laid up a mighty store of knowledge. Rocked in the cradle of the Revolution, he grew up an ardent devotee of Liberty; and, consistent throughout, a determined opponent of Slavery. Called very early by Washington into public service, and found, on the first trial to be competent and trustworthy, he could never thenceforth be spared from that service: and he filled all the high offices of his country so well, that it is difficult to name one who has filled either of them better. Reared from childhood to look to the bible as the only sure guide to duty, his whole life, public and private, has been marked by the humility, integrity, justice, and truth of a Christian; and to the thoughtful observer exhibits a 'daily beauty,' by the side of which most other lives look "ugly." Acting always with upright intentions, he knew no fear but that of doing wrong; and through many trials and vicissitudes, was always "faithful found among the faithless." Deeply sensible of the importance of time, he made the most of every moment; and judiciously governing all his appetites, he preserved his faculties in full vigor to a ripe old age. For all these reasons, the life which has just so gloriously closed for himself, while it has already been one of exceeding, almost unsurpassed usefulness to his country, should be in the future as an example and a MODEL to us and to posterity—one of ever increasing usefulness and glory, so long as History shall be faithful to its highest trust.

"In conclusion—We are usually admonished that the most solemn lesson taught by such an event as this which we now commemorate, is "the nothingness of life"—"what shadows we are, and what shadows we pursue." But I cannot so regard it. On the contrary, I have never been so profoundly and solemnly impressed with a conviction of the infinite importance which may be given to the life of man on earth, by a faithful and conscientious devotion of all its precious moments to the nurture and development of the soul's highest faculties. Who shall say that the life of John Quincy Adams was a shadow, pursuing shadows? If so, there is nothing substantial on earth—"nothing serious in mortality." But no: His great example should teach us, more than ever before, to realize the true dignity of man, as conceived by the greatest of poets:

"'What a piece of work is man! How noble in reason! How infinite in faculties! In form and moving, how express and admirable! In action, how like an angel! In apprehension, how like a God!'"

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* A just man, and firm of purpose, whose solid soul could not be shaken, either by the threats of a mob, or the frowns of a tyrant.